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2
3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 * * *

6 STANLEY RIMER,

Case No. 3:18-cv-00023-MMD-CSD

7 v.

Petitioner,

ORDER

8 RENEE BAKER,¹ *et al.*,

9 Respondents.

10

I. **SUMMARY**

11 Petitioner Stanley Rimer, who was sentenced to eight to 30 years in prison after
12 being found guilty by a jury of one count of involuntary manslaughter, one count of child
13 neglect or endangerment resulting in substantial bodily harm, and five counts of child
14 abuse or neglect, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. (ECF
15 Nos. 17 (“Petition”); 18-3.) This matter is before this Court for adjudication of the merits
16 of Rimer’s amended petition, in which Rimer alleges: (1) his trial counsel was ineffective,
17 (2) there was insufficient evidence to support his convictions, (3) Nevada’s child abuse or
18 neglect statute is unconstitutionally vague, (4) the state district court erred in refusing to
19 sever his charges and sever his trial from his co-defendant, (5) there was prosecutorial
20 misconduct, and (6) cumulative error. (ECF No. 17.) For the reasons discussed below,
21 the Court denies the Petition but grants a Certificate of Appealability for grounds 4 and 5
22 only.
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25 ¹The inmate locator page on the state corrections department’s website indicates
26 that Rimer was granted parole on November 1, 2019. Should there be any further
27 proceedings in this federal matter, the parties should substitute a proper current
28 respondent in the place of Rimer’s former physical custodian, Renee Baker. The 1976
Advisory Committee Notes to Subdivision (b) of Rule 2 of the Rules Governing Section
2254 Cases suggest the proper respondent for a petitioner who is on parole is “the
particular . . . parole officer responsible for supervising the applicant, and the official in
charge of the parole or probation agency, or the state correctional agency, as
appropriate.”

1 **II. BACKGROUND²**

2 Rimer and his wife, Colleen Rimer (hereinafter “Colleen”), had eight children:
 3 Stanley Rimer III (hereinafter “Stanley III”), Brandon Rimer (hereinafter “Brandon”), C.R.,
 4 A.R., Q.R., E.R., S.R., and J.R.³ (ECF No. 30-36 at 131-32.) At the time of Rimer’s trial
 5 in 2011, Stanley III was 24 years old, Brandon was 22 years old, C.R. was 20 years old,
 6 A.R. was 18 years old, Q.R. was 17 years old, E.R. was 14 years old, and S.R. was 12
 7 years old. (*Id.*) J.R., the youngest child, who was born on March 11, 2004, had myotonic
 8 dystrophy, a form of muscular dystrophy, and required a feeding tube for most of his first
 9 year of life. (ECF Nos. 30-35 at 97; 30-36 at 139; 31-1 at 212.) J.R.’s myotonic dystrophy
 10 affected his physical abilities and his ability to speak, and even though he turned 4 years
 11 old in 2008, he acted “closer to the age of 2” and still required the use of diapers. (ECF
 12 No. 30-36 at 41, 46.) Colleen, who was a stay-at-home mom and suffered from adult-
 13 onset myotonic dystrophy, and Brandon primarily cared for J.R.⁴ (*Id.* at 54; ECF No. 31-
 14 1 at 204.)

15 On June 8, 2008, a Sunday, Rimer drove Brandon, A.R., Q.R., E.R., and S.R. to
 16 church. (ECF No. 30-37 at 23.) Colleen took J.R. to the church a little while later around
 17 12:20 p.m. (ECF No. 30-36 at 57.) Rimer left during the church services, allegedly
 18 because he was not feeling well,⁵ and Colleen and the children, with the exception of
 19 Brandon who was staying behind to discuss his mission, left the church a little after 2:00
 20 p.m. in her Ford Excursion. (*Id.* at 58; ECF No. 30-37 at 58-59.) When they arrived home,

21 2The Court makes no credibility findings or other factual findings regarding the truth
 22 or falsity of this evidence from the state court. This Court’s summary is merely a backdrop
 23 to its consideration of the issues presented in the Petition. Any absence of mention of a
 24 specific piece of evidence does not signify this Court overlooked it in considering Rimer’s
 25 claims.

26 3The Court only refers to minor children by their initials. See LR IC 6-1(a)(2). The
 27 Court uses the date of the incident in question, June 8, 2008, to determine whether the
 28 Rimer children were minor children.

2 4There was testimony that Rimer never changed J.R.’s diapers. (ECF No. 30-36 at
 29 140.)

2 5Brandon testified that there was no indication to his knowledge that Rimer was
 2 not feeling well on June 8, 2008. (ECF No. 30-37 at 24.)

1 Colleen asked one of the children to get J.R., who was not known to be able to unhook
 2 his seat belt, out of the car, but that did not occur. (ECF No. 30-36 at 55, 59.) The family
 3 entered the home, and Colleen, who allegedly was also not feeling well,⁶ cooked dinner
 4 for approximately thirty minutes before going upstairs to join Rimer in their bedroom to
 5 take a nap and rest.⁷ (*Id.* at 61.)

6 Later, Colleen asked a few of the children if they knew where J.R. was located.
 7 (*Id.*) The children looked for J.R. (*Id.* at 63.) Colleen “went and looked for [J.R. too, but
 8 she] didn’t see him either, so [she did not] know why it slipped [her] mind.” (*Id.* at 62.)
 9 Colleen went back to her bedroom, and when she came back downstairs later, she asked
 10 the children in general where J.R. was located, and “they said he was back in his bed.”
 11 (*Id.* at 64.) Colleen left the residence around 5:00 p.m. to pick up Brandon, but she used
 12 Rimer’s pickup truck because her Excursion did not have a lot of fuel in it. (*Id.* at 66.)
 13 Colleen and Brandon got home at 5:30 p.m., and Colleen “went straight upstairs and went
 14 to sleep.” (*Id.* at 67.) After napping, Colleen watched a movie and then went to sleep for
 15 the night. (*Id.* at 68.)

16 Colleen woke up around 7:00 a.m. on June 9, 2008, and she went downstairs
 17 around 8:00 a.m. (*Id.* at 70.) At that point, she asked one of the children to go to the
 18 Excursion. (*Id.*) Q.R. went to the vehicle and came back inside screaming that J.R. was
 19 in the vehicle and was dead. (*Id.* at 71.) Q.R. testified that the windows of the vehicle
 20 were all the way up. (ECF No. 30-38 at 58.) Colleen tried to pick up J.R., but he was too
 21 heavy, so she laid him back down and went inside the residence and called 911. (ECF
 22 No. 30-36 at 71.) Brandon went out to the vehicle and when he was on his way back into
 23 the residence, Rimer came out of the residence and turned on the car “so he could roll
 24 down the windows.” (ECF No. 30-37 at 32.)

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26 ⁶On June 14, 2008, almost a week after J.R. was left in the vehicle, Collen was
 27 diagnosed with bronchitis and sinusitis. (ECF No. 31-4 at 58.)

28 ⁷C.R. testified that Sunday was a day of rest, so it was customary for Rimer to stay
 in his room on Sunday afternoons after church. (ECF No. 30-36 at 146.)

1 The Clark County Fire Department arrived at the Rimer residence at approximately
 2 8:30 a.m., and a fire captain observed Brandon carrying J.R. “across the front sidewalk
 3 area” into the residence. (ECF No. 30-35 at 82, 85, 87, 89, 94.) When responders entered
 4 the residence and observed J.R. laying on the couch, “his appearance immediately
 5 confirmed . . . that he had passed away.” (*Id.* at 92.) J.R. was rigid and not breathing, and
 6 “[h]is nose had absolutely been completely obscured by what appeared to be [a] white
 7 mucus type substance.” (*Id.*) Rimer “seemed rather calm” and “somewhat emotionless.”
 8 (*Id.* at 98.) Colleen later told detectives that she was responsible for what happened,
 9 although it is unclear if she meant initially leaving J.R. in the vehicle or his ultimate death.
 10 (ECF No. 30-36 at 74, 123-24.)

11 The medical examiner conducted an autopsy of J.R. and determined that J.R. “died
 12 as a result of environmental heat stress.” (ECF No. 30-39 at 124, 126, 138.) The shirt J.R.
 13 was wearing “was filthy,” and “[h]is fingernails were dirty as well.” (*Id.* at 130.) The medical
 14 examiner determined that J.R.’s manner of death was homicide based “upon the fact that
 15 he was a small child with disabilities who had difficulty getting around, couldn’t get out of
 16 the car by himself and was essentially left there.” (*Id.* at 140-41.)

17 A crime scene analyst for the Las Vegas Metropolitan Police Department arrived
 18 at the Rimer residence on June 9, 2008. (ECF No. 30-35 at 107.) That analyst testified
 19 that “each room [of the residence] had so many boxes and furniture stacked” and “so
 20 much debris.” (*Id.* at 109-10.) Additionally, the kitchen “counters weren’t clean,” there
 21 were dishes that had been sitting in the kitchen sink “for a while,” the floors had food that
 22 had been spilled and not cleaned, the floors “had not been swept in sometime,” the family
 23 room “had boxes stacked all around the outside,” “the master bedroom [had] boxes and
 24 containers[and] dressers covered with boxes stacked with debris,” the downstairs
 25 bedrooms had “so many items of clothing that it was difficult . . . to navigate the room,”
 26 there were bird cages throughout the residence that “didn’t appear to be maintained,” and
 27 there were “aquariums [that] were all algae filled.” (*Id.* at 110-11; ECF No. 30-36 at 21.)
 28 Similarly, C.R. testified that the Rimer residence had lots of clutter, there would be feces

1 from the dog or birds that would not be cleaned up for a day or two “until somebody
 2 noticed it,” and “[a] lot of times” the bathrooms, kitchen, and floors would be dirty. (ECF
 3 No. 30-36 at 133–34, 154.) C.R. also testified that Rimer’s house-building business
 4 closed “and all that stuff that was inside of his office was moved . . . into the house.” (*Id.*
 5 at 149.) This resulted in the residence being unsafe from “the tools piled up.” (*Id.* at 155.)
 6 Further, during J.R.’s first year of life, J.R. was a part of an early intervention program,
 7 and during a site visit in September 2004, the Rimer residence was smelly, unclean,
 8 cluttered, and disorganized. (ECF No. 31-1 at 48.) And during later site visits, the Rimer
 9 residence was cluttered and unclean and had dirty carpets and “animal feces on the floor.”
 10 (*Id.* at 56.)

11 In addition to the residence’s cleanliness, the Rimer household had issues with
 12 lice for numerous years, including “the whole time [J.R.] was alive.” (ECF No. 30-36 at
 13 134.) A.R.’s special education teacher testified that “[t]here were numerous instances of
 14 head lice infestation[, a]nd one instance of body lice infestation,” which the teacher “could
 15 see . . . feeding on [A.R.’s] upper neck and cheek.” (ECF No. 30-39 at 7, 11.) The teacher
 16 reported the body lice situation to CPS. (*Id.* at 14.) This teacher also reported other issues
 17 regarding A.R. to CPS: “[A.R.] coming to school with no shoes and instances of [A.R.]
 18 coming to school without lunch money or lacking a free lunch form, so he was unable to
 19 eat.” (*Id.* at 15.) A CPS investigator responded to the teacher’s CPS report by arriving at
 20 the Rimer residence unannounced on September 16, 2005, a Friday. (*Id.* at 78, 80.)
 21 Brandon told the CPS worker that Rimer and Colleen were out of town for the weekend,
 22 which was concerning to the CPS investigator because there were no adults to care for
 23 J.R., who was only one-year old at the time, and A.R., who had special needs. (*Id.* at 80-
 24 81.)

25 Regarding punishment, C.R. testified that Rimer would use a four-foot-long oar or
 26 a paint stirring stick to spank the children. (ECF No. 30-36 at 141.) According to C.R.,
 27 Rimer would spank the children on the butt, which was sometimes bare, between two and
 28 50 times. (*Id.* at 156.) C.R. saw Rimer hit Q.R. with a closed fist on his chest or shoulder

1 and saw Rimer hit her other brothers in “the chest, stomach, back, arms.” (*Id.* at 143,
 2 160.) Brandon confirmed Rimer’s use of a three- or four-foot oar or a paint stick to inflict
 3 punishment, testifying that spanking “was pretty common.” (ECF No. 30-37 at 8–9, 13.)
 4 Q.R. testified that Rimer had drawn teeth on the paddle, that Rimer spanked him
 5 approximately 20 times between 2004 and 2008, that Rimer punched him once with a
 6 closed fist, and that Rimer called him the devil. (ECF No. 30-38 at 38-39, 41-42.) Further,
 7 according to C.R., as a severe punishment, Rimer would send the children to bed without
 8 dinner. (ECF No. 30-36 at 170.) Q.R. testified that he was punished with only water and
 9 bread for dinner on one or two occasions. (ECF No. 30-38 at 43.)

10 Regarding hygiene, J.R.’s Sunday school teacher testified that on one occasion
 11 J.R. had a dirty diaper, and although Colleen was asked 3 times to change it, she kept
 12 returning J.R. with the same soiled diaper. (ECF No. 30-39 at 105, 109.) J.R.’s Sunday
 13 school teacher also testified that on the day he died, June 8, 2008, J.R. smelled like stale
 14 urine, “he had a lot of flakes in his hair,” and “his hands [and fingernails] were dirty. (*Id.*
 15 at 112.) And earlier during J.R.’s early intervention program site visit in September 2004,
 16 J.R.’s program worker noticed that J.R.’s G-tube site “was leaking,” was red, and
 17 appeared as if “it wasn’t being cleaned properly.” (ECF No. 31-1 at 49-50.) Also, J.R.’s
 18 “fingernails were black. He wasn’t clean. His diaper was full.” (*Id.* at 50-51.) And during a
 19 site visit in March 2005, J.R.’s G-tube site “was very necrotic looking,” was very red, “[t]he
 20 skin look[ed] rotten” with oozing puss, and “it appeared that [J.R.] was uncomfortable with
 21 it.” (*Id.* At 65-66.) And from for the next few months following March 2005, “[J.R.’s]
 22 fingernails . . . were never clean. The G-tube site still was not healthy. He usually was in
 23 a T-shirt and diaper which was usually full.” (*Id.* at 68.)

24 In addition to A.R.’s special education teacher reporting issues to CPS, J.R.’s early
 25 intervention program worker observed Colleen feeding J.R. with a bottle rather than
 26 through his G-tube and reported the issue to CPS. (ECF No. 31-1 at 58-60.) In response
 27 to the CPS report, Rimer left a voicemail for the program worker, threatening to destroy
 28 her family. (*Id.* at 61.) Similarly, on a different occasion, Rimer called a CPS supervisor

1 and threatened that person by saying that "he was going to make everybody associated
 2 with the case - - life a living Hell." (ECF No. 30-39 at 51.)

3 Regarding the CPS investigations, C.R. testified that Rimer told her "[t]o not talk to
 4 CPS and law enforcement or anything" on June 9, 2008, and on previous occasions when
 5 CPS would visit. (ECF No. 30-36 at 161-62.) And Brandon testified that he saw Rimer
 6 congratulating and rewarding one of his brothers "for not saying anything about what was
 7 going on in the home" to CPS. (ECF No. 30-37 at 21-22.) A CPS investigator testified that
 8 he visited the Rimer residence twice in the summer of 2006, and on both occasions, Rimer
 9 refused to allow the investigator to enter the residence or speak with the children alone.
 10 (ECF No. 30-39 at 24-25, 28, 31, 33.)

11 Rimer was found guilty of the involuntary manslaughter of J.R. (count 1); child
 12 neglect or endangerment resulting in substantial bodily harm as to J.R. on June 8 and 9,
 13 2008 (count 2); child abuse or neglect as to J.R. prior to June 8, 2008 (count 3); and child
 14 abuse or neglect as to S.R., E.R., Q.R., and A.R. (counts 4, 5, 6, 7). (ECF No. 31-11.)
 15 Colleen was found guilty of the involuntary manslaughter of J.R. (count 1); child neglect
 16 or endangerment resulting in substantial bodily harm as to J.R. on June 8 and 9, 2008
 17 (count 2); child abuse or neglect as to J.R. prior to June 8, 2008 (count 3); child abuse or
 18 neglect as to A.R. (count 7); but not guilty of child abuse or neglect as to S.R., and E.R.
 19 (counts 4, 5, 6). (ECF No. 31-10 at 5-6.) The Nevada Supreme Court affirmed Rimer's
 20 judgment of conviction, and the Nevada Court of Appeals affirmed the denial of his post-
 21 conviction petition. (ECF Nos. 18-7; 18-12.)

22 **III. STANDARD OF REVIEW**

23 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in
 24 habeas corpus cases under the Antiterrorism and Effective Death Penalty Act
 25 ("AEDPA"):

26 An application for a writ of habeas corpus on behalf of a person in custody
 27 pursuant to the judgment of a State court shall not be granted with respect
 28 to any claim that was adjudicated on the merits in State court proceedings
 unless the adjudication of the claim —

1 (1) resulted in a decision that was contrary to, or involved an
 2 unreasonable application of, clearly established Federal law, as
 3 determined by the Supreme Court of the United States; or

4 (2) resulted in a decision that was based on an unreasonable
 5 determination of the facts in light of the evidence presented in the
 6 State court proceeding.

7 A state court decision is contrary to clearly established Supreme Court precedent, within
 8 the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the
 9 governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a
 10 set of facts that are materially indistinguishable from a decision of [the Supreme] Court.”
 11

12 *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362,
 13 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision

14 is an unreasonable application of clearly established Supreme Court precedent within
 15 the meaning of 28 U.S.C. § 2254(d) “if the state court identifies the correct governing
 16 legal principle from [the Supreme] Court’s decisions but unreasonably applies that
 17 principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting *Williams*, 529 U.S. at 413).
 18

19 “The ‘unreasonable application’ clause requires the state court decision to be more than
 20 incorrect or erroneous. The state court’s application of clearly established law must be
 21 objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409-10) (internal citation
 22 omitted).

23 The Supreme Court has instructed that “[a] state court’s determination that a
 24 claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could
 25 disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 562
 26 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The
 27 Supreme Court has stated “that even a strong case for relief does not mean the state
 28 court’s contrary conclusion was unreasonable.” *Id.* at 102 (citing *Lockyer*, 538 U.S. at
 29 75); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as
 30 a “difficult to meet” and “highly deferential standard for evaluating state-court rulings,
 31 which demands that state-court decisions be given the benefit of the doubt” (internal
 32 quotation marks and citations omitted)).

1 **IV. DISCUSSION**

2 **A. Ground 1—Ineffective Assistance of Counsel (counts 3-7)**

3 In ground 1, Rimer alleges that his Sixth Amendment right to the effective
4 assistance of trial counsel was violated because his counsel failed to adequately
5 challenge counts 3-7. (ECF No. 17 at 20.) Specifically, Rimer argues that counsel failed
6 to object to the ambiguous and missing jury instructions on counts 3-7, failed to object
7 to prosecutorial misconduct when the prosecutor argued a theory that was contrary to
8 the charged felonies in counts 3-7, failed to request the verdict sheet on counts 3-7 be
9 amended to specify whether he was being convicted of child abuse or neglect as a felony
10 or gross misdemeanor, and failed to object to the fatal variance between the amended
11 indictment and the evidence, arguments, and instructions as to counts 3-7. (*Id.* at 24-
12 26.) Rimer also argues that counsel's cumulative errors with respect to counts 3-7
13 resulted in a due process violation because they allowed him to be convicted of five
14 felonies absent proof beyond a reasonable doubt. (*Id.* at 26.)

15 **1. Procedural Default**

16 The Court previously determined that ground 1 was technically exhausted because
17 it would be procedurally barred in the state courts. (ECF No. 57 at 1.) Rimer previously
18 argued that he could demonstrate cause and prejudice under *Martinez v. Ryan*, 566 U.S.
19 1 (2012) to excuse the default. (ECF No. 43 at 5.) This Court found that Rimer had
20 arguably met three of the elements of *Martinez*: (1) he had no counsel during his state
21 post-conviction habeas corpus proceedings, (2) his state post-conviction petition was the
22 initial proceeding regarding claims of ineffective assistance of trial counsel, and (3)
23 Nevada law requires that a claim of ineffective of assistance of trial counsel be raised in
24 a post-conviction habeas corpus proceeding. (ECF No. 57 at 3.) However, the Court
25 deferred consideration of the fourth element of *Martinez*: whether the claim of ineffective
26 assistance of trial counsel is substantial. (*Id.* at 4.) This Court will now determine, pursuant
27
28

1 to a *de novo* review, whether Rimer's ineffective assistance of trial counsel claim is
 2 substantial. See *Ramirez v. Ryan*, 937 F.3d 1230, 1243 (9th Cir. 2019).⁸

3 **2. Background Information**

4 The amended indictment was filed on October 3, 2008. (ECF No. 28-26.) In count
 5, the State alleged that Rimer:

6 did, on or between March 11, 2004, and June 7, 2008, willfully, unlawfully,
 7 and knowingly cause a child under the age of 18 years, to-wit: [J.R.], being
 8 approximately 4 years of age, to suffer unjustifiable physical pain, or mental
 9 suffering as a result of abuse or neglect, or by placing the said baby [J.R.]
 10 in a situation where he might have suffered unjustifiable physical pain or
 11 mental suffering as a result of abuse or neglect, by failing to provide the
 12 proper care necessary for the well being of [J.R.] by exposing him to unsafe
 13 and/or unhealthy living conditions consisting of a foul smelling house
 14 cluttered with furniture, tools, chemical containers, dirty clothes, animals,
 15 filthy aquariums, and/or by providing minimal food and/or by failing to
 16 provide adequate medical care and/or failing to clean baby [J.R.]

17 (ECF No. 28-26 at 4.) In count 4, the State alleged that Rimer:

18 did, on or between March 11, 2004, and June 9, 2008, willfully, unlawfully,
 19 and knowingly cause a child under the age of 18 years, to-wit: [S.R.], being
 20 approximately 9 years of age, to suffer unjustifiable physical pain, or
 21 mental suffering as a result of abuse or neglect, or by placing the said
 22 [S.R.] in a situation where he might have suffered unjustifiable physical
 23 pain or mental suffering as a result of abuse or neglect, by failing to provide
 24 the proper care necessary for the well being of [S.R.] by exposing him to
 25 unsafe and/or unhealthy living conditions consisting of a foul smelling
 26 house cluttered with furniture, tools, chemical containers, dirty clothes,
 27 animals, filthy aquariums, and/or by providing minimal food and/or by
 28 withholding and limiting food intake of [S.R.] and or by causing or allowing
 verbal abuse and/or by causing or allowing excessive corporal punishment
 and/or by exposing [S.R.] to lice without proper care and treatment.

29 (*Id.* at 4-5.) Count 5, regarding E.R., who was approximately 12 years of age, mirrors
 30 count 4. (*Id.* at 5.) In count 6, the State alleged that Rimer:

31 did, on or between March 11, 2004, and June 9, 2008, willfully, unlawfully,
 32 and knowingly cause a child under the age of 18 years, to-wit: [Q.R.], being
 33 approximately 14 years of age, to suffer unjustifiable physical pain, or
 34 mental suffering, or by placing the said [Q.R.] in a situation where he might
 35 have suffered unjustifiable physical pain or mental suffering, by failing to
 36 provide the proper care necessary for the well being of [Q.R.] by exposing
 37 him to unsafe and/or unhealthy living conditions consisting of a foul smelling
 38 house cluttered with furniture, tools, chemical containers, dirty clothes,

39 ⁸Respondents argue that *Martinez* is inapplicable because Rimer raised ineffective
 40 assistance of counsel claims in his state habeas petition. (ECF No. 68 at 17 (citing *Senior*
 41 v. *Gilbert*, 720 F. App'x 882, 883 (9th Cir. 2018).) However, Respondents fail to articulate
 42 or demonstrate that Rimer raised the specific allegations in ground 1 within his state
 43 habeas petition. (See *id.* at 17-18.)

1 animals, filthy aquariums, and/or by providing minimal food and/or by
2 withholding and limiting food intake of [Q.R.] and or by causing or allowing
3 verbal abuse and/or by causing or allowing excessive corporal punishment
4 and/or by exposing [Q.R.] to lice without proper care and treatment.

5 (*Id.* at 5-6.) In count 7, the State alleged that Rimer:

6 did, on or between March 11, 2004, and June 9, 2008, willfully, unlawfully,
7 and knowingly cause a child under the age of 18 years, to-wit: [A.R.], being
8 approximately 15 years of age, to suffer unjustifiable physical pain, or
9 mental suffering as a result of abuse or neglect, or by placing the said [A.R.]
10 in a situation where he might have suffered unjustifiable physical pain or
11 mental suffering as a result of abuse or neglect, by failing to provide the
12 proper care necessary for the well being of [A.R.] by exposing him to unsafe
13 and/or unhealthy living conditions consisting of a foul smelling house
14 cluttered with furniture, tools, chemical containers, dirty clothes, animals,
15 filthy aquariums, and/or by providing minimal food and/or by withholding and
16 limiting food intake of [A.R.] and or by causing or allowing verbal abuse
17 and/or by causing or allowing excessive corporal punishment and/or by
18 exposing [A.R.] to lice without proper care and treatment and/or failing to
19 get medical attention for his disabilities.

20 (*Id.* at 6.)

21 **3. Child Abuse and Neglect**

22 Nevada law defines child abuse and neglect as either (1) “willfully [causing] a
23 child . . . to suffer unjustifiable physical pain or mental suffering as a result of abuse or
24 neglect or [placing a child] in a situation where the child may suffer physical pain or
25 mental suffering as the result of abuse or neglect,” or (2) “permit[ting] or allow[ing] a
26 child to suffer unjustifiable physical pain or mental suffering as a result of abuse or
27 neglect or [placing a child] in a situation where the child may suffer physical pain or
28 mental suffering as the result of abuse or neglect.” NRS §§ 200.508(1), (2).

29 A conviction under NRS § 200.508(1) is always a felony. A conviction under NRS
30 § 200.508(2) is a felony if it results in substantial bodily or mental harm or if the person
31 had previously been convicted of similar conduct; however, if it does not result in
32 substantial bodily or mental harm and the defendant has not previously been convicted
33 of similar conduct, it is a gross misdemeanor.

34 ///

35 ///

1 **4. Ineffective Assistance of Counsel Standard**

2 In *Strickland v. Washington*, the Supreme Court propounded a two-prong test for
 3 analysis of claims of ineffective assistance of counsel requiring the petitioner to
 4 demonstrate (1) that the attorney's "representation fell below an objective standard of
 5 reasonableness," and (2) that the attorney's deficient performance prejudiced the
 6 defendant such that "there is a reasonable probability that, but for counsel's
 7 unprofessional errors, the result of the proceeding would have been different." 466 U.S.
 8 668, 688, 694 (1984). A court considering a claim of ineffective assistance of counsel
 9 must apply a "strong presumption that counsel's conduct falls within the wide range of
 10 reasonable professional assistance." *Id.* at 689. The petitioner's burden is to show "that
 11 counsel made errors so serious that counsel was not functioning as the 'counsel'
 12 guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, to establish
 13 prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the
 14 errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather,
 15 the errors must be "so serious as to deprive the defendant of a fair trial, a trial whose
 16 result is reliable." *Id.* at 687.

17 **5. Analysis**

18 The amended indictment did not specify which section of NRS § 200.508 Rimer
 19 was being charged under, nor did it specify whether he was being charged with felonies
 20 or gross misdemeanors. (ECF No. 28-26 at 2.) However, the language within the
 21 amended indictment tracks NRS § 200.508(1)—willfully causing physical pain or mental
 22 suffering. (See *id.* at 4-6.) Indeed, at Rimer's sentencing hearing, after noting that the
 23 Department of Parole and Probation had recommended that counts 3-7 be treated as
 24 gross misdemeanors, the prosecutor requested that counts 3-7 be treated as felonies
 25 because "they're all charged as felonies." (ECF No. 31-13 at 14.) The state district court
 26 agreed, indicating that it was going to adjudicate counts 3-7 as felonies. (*Id.* at 30-31.)
 27 This Court will now address Rimer's five specific allegations regarding counsel's
 28 handling of counts 3-7.

1 **a. Jury Instructions (counts 3-7)**

2 Jury Instruction No. 9 provided:

3 A person is guilty of the offense of Child Abuse if:

- 4 (1) the person willfully causes a child who is less than 18 years of age:
5 (a) to suffer unjustifiable physical pain or mental suffering as a
 result of abuse or,
6 (b) to be placed in a situation where the child may suffer physical
 pain or mental suffering as the result of abuse.

7 (ECF No. 31-9 at 14.) Relatedly, Jury Instruction No. 10 provided:

8 A person is guilty of the offense of Child Neglect or Endangerment if:

- 9 (1) the person willfully causes a child who is less than 18 years of age:
10 (a) to suffer unjustifiable physical pain or mental suffering as a
 result of neglect or,
11 (b) to be placed in a situation where the child may suffer physical
 pain or mental suffering as the result of neglect;

12 OR

- 13 (2) the person is responsible for the safety or welfare of a child who is
14 less than 18 years of age and permits or allows that child:
15 (a) to suffer unjustifiable physical pain or mental suffering as a
 result of neglect or,
16 (b) to be placed in a situation where the child may suffer physical
 pain or mental suffering as the result of neglect.

17 *(Id. at 15.)*

18 While Rimer acknowledges that Jury Instruction No. 9 “tracked section 1 of §
19 200.508,” he argues that Jury Instruction No. 10 “tracked both sections 1 and 2 of the
20 statute,” thereby permitting the jury to convict Rimer of a felony under the gross
21 misdemeanor standard. (ECF No. 73 at 14-15.) It is true that the jury instructions did not
22 inform the jury which instructions applied to counts 3-7, so the jurors could have
23 theoretically applied the second portion of Jury Instruction 10,⁹ which tracked NRS §
24 200.508(2), the gross misdemeanor portion of the statute, to convict Rimer of felonies
25 in counts 3-7.

26 It appears that Rimer’s counsel may have acted to try to avoid this issue. During
27 discussions about jury instructions, regarding counts 3-7, the state district court stated
28 that it did not “agree with the defense proposition that somehow [the jury has] to be

⁹It appears that Jury Instruction No. 10 was meant to apply to count 2, the charge of child neglect or endangerment with substantial bodily harm. (See ECF No. 31-9 at 24.)

1 unanimous on what theory of conduct is neglectful in their mind." (ECF No.31-4 at 25.)
2 However, even if Rimer's counsel was deficient for failing to argue that the jury
3 instructions should have been clearer regarding which instruction(s) applied to counts
4 3-7, Rimer fails to demonstrate prejudice. See *Strickland*, 466 U.S. at 688, 694.

In affirming Rimer's judgment of conviction, the Nevada Supreme Court held that "the jury was properly instructed on counts 3 through 7." (ECF No. 18-7 at 31.) Therefore, Rimer fails to demonstrate a reasonable probability that the result of the jury instruction discussions would have been different—i.e., that the state district court would have altered the jury instructions regarding counts 3-7—if his counsel had made a request to do so. See *Strickland*, 466 U.S. at 694. And further, as is discussed in ground 2, Rimer also fails to demonstrate a reasonable probability that the result of his trial would have been different—i.e., that the jury would not have found him guilty of counts 3-7—if the jury instructions had clearly articulated that counts 3-7 required willful conduct because there was sufficient evidence to sustain Rimer's conviction for willfully abusing or neglecting his children in counts 3-7. *Id.*

b. Failure to Object to Prosecutor's Argument (counts 3-7)

17 Rimer argues that the prosecutor argued a theory that was contrary to the
18 charged felonies in counts 3-7, and his counsel failed to object. (ECF No. 73 at 19.)
19 During closing arguments, the prosecutor commented, *inter alia*, that (1) “who knew
20 better than Stanley Rimer” about the “crimes that were being committed inside the Rimer
21 home on a monthly basis,” (2) “[w]hat evidence is there to show you that he knew full
22 well what was going on inside the home and that it was criminal,” (3) “[w]hat other
23 evidence is there that compels the conclusion of Stanley Rimer’s knowledge of the
24 crimes occurring in his home,” and (4) “[w]e have charged and alleged . . . a number of
25 different acts that occurred inside the home that you can find one more or all of them to
26 exist to establish abuse or neglect or neglect and endangerment.” (ECF No. 31-4 at 100-
27 01, 107.) Because these arguments center on Rimer’s knowledge—rather than his willful
28 conduct—of the abuse and neglect allegations, it appears that Rimer’s counsel could

1 have objected to these arguments on the basis to which he now argues: the prosecutor
2 argued a theory that was contrary to the charged felonies in counts 3-7.

It is unclear why Rimer's counsel did not object to any of these arguments, especially since Rimer's counsel had moved prior to trial to dismiss the indictment and stay the proceeding based, *inter alia*, on an argument that "the indictment lacks sufficient specificity allowing the prosecutor to change theories mid-trial." (ECF No. 30-22.) However, it could be that the decision not to object was strategic. See *Richter*, 562 U.S. at 106 ("Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach."). Rimer's counsel may have preferred to address the issue in his closing argument. (See, e.g., ECF No. 31-4 at 122-23 (Rimer's counsel's closing argument that "[t]he State failed to prove that the incidents of neglect in that home rose to the level of criminal felony neglect")).

13 However, even if Rimer’s counsel acted deficiently in not objecting to the
14 prosecutor’s closing argument, Rimer fails to demonstrate a reasonable probability that
15 the result of his trial would have been different—i.e., that the jury would not have found
16 him guilty of counts 3-7—if he would have objected to the prosecutor’s closing argument
17 because (1) the jury was instructed that “arguments . . . of counsel are not evidence in
18 the case” (ECF No. 31-9 at 28) and (2) there was sufficient evidence to sustain Rimer’s
19 felony convictions in counts 3-7, as is further discussed in ground 2. See *Strickland*, 466
20 U.S. at 694.

c. Verdict Sheet

22 On the verdict form, counts 3-7 all had a title of "Child Abuse or Neglect" and then
23 provided the corresponding child's name. (ECF No. 31-11 at 3-4.) The jury was then
24 given the option of finding Rimer "Guilty of Child Abuse or Neglect" or "Not Guilty." (*Id.*)
25 Rimer argues that this was insufficient because it did not specify whether the jury was
26 finding him guilty of child abuse or neglect as a felony or as a gross misdemeanor. (ECF
27 No. 73 at 21.)

28 | //

Rimer's counsel did not request that the verdict form be amended in any way. (See ECF No. 31-4 at 43-46.) And because counts 3-7 were plead as felonies, it is not immediately apparent that counsel's lack of request to include the option of finding Rimer guilty of gross misdemeanors was deficient. Indeed, it may have been a strategic decision to not request the option of finding Rimer guilty of gross misdemeanors be included as lesser included crimes on the verdict sheets because Rimer's counsel may have been confident that the jury would find him not guilty of counts 3-7 if they were only given the options of finding him guilty of felonies or finding him not guilty—as opposed to also being given the intermediate option of finding him guilty of gross misdemeanors. See *Richter*, 562 U.S. at 107 (“Counsel was entitled to formulate a strategy that was reasonable at the time.”).

However, as was discussed previously, Rimer also fails to demonstrate a reasonable probability that the result of his trial would have been different—i.e., that the jury would not have found him guilty of felonies in counts 3-7—if the jury would have been given the option of instead finding him guilty of gross misdemeanors in counts 3-7 because there was sufficient evidence to sustain Rimer's felony convictions in counts 3-7. See *Strickland*, 466 U.S. at 694.

d. Variance Between Indictment and Evidence, Arguments, and Instructions

Rimer argues that the variance between the indictment and the evidence, the prosecutor's argument, and the jury instructions allowed him “to be convicted based on his being a parent and permitting or allowing his children to suffer harm, rather than actually causing it.” (ECF No. 73 at 23 (citing *Berger v. United States*, 295 U.S. 78, 82 (1935) (explaining that where there is a variance between “the allegations [in an indictment] and proof [at trial],” the inquiry is “whether there has been such a variance as to ‘affect the substantial rights’ of the accused”)).)

The Court disagrees that there was a variance. The amended indictment charged Rimer with felony child abuse or neglect and, as has been discussed several times in

1 this ground, there was evidence presented at trial that Rimer willfully abused or neglect
 2 his children. As such, Rimer's counsel was not deficient for not objecting to the alleged
 3 variance. See *Strickland*, 466 U.S. at 688.

4 **e. Cumulative Error (counts 3-7)**

5 The Court has not identified any definite errors on the part of Rimer's counsel
 6 regarding counts 3-7, so there are no errors to cumulate. In sum, ground 1 is not
 7 substantial for purposes of *Martinez*, is procedurally defaulted, and is therefore
 8 dismissed.

9 **B. Ground 2—Sufficiency of the Evidence**

10 In ground 2, Rimer alleges that his right to due process was violated because the
 11 evidence presented at his trial was insufficient to sustain his convictions. (ECF No. 17
 12 at 27.)

13 **1. Sufficiency of the Evidence Standard**

14 "[T]he Due Process Clause protects the accused against conviction except upon
 15 proof beyond a reasonable doubt of every fact necessary to constitute the crime with
 16 which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). A federal habeas
 17 petitioner "faces a heavy burden when challenging the sufficiency of the evidence used
 18 to obtain a state conviction on federal due process grounds." *Juan H. v. Allen*, 408 F.3d
 19 1262, 1274 (9th Cir. 2005). On direct review of a sufficiency of the evidence claim, a
 20 state court must determine whether "any rational trier of fact could have found the
 21 essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443
 22 U.S. 307, 319 (1979) (emphasis in original). The evidence is to be viewed "in the light
 23 most favorable to the prosecution." See *id.* Federal habeas relief is available only if the
 24 state-court determination that the evidence was sufficient to support a conviction was
 25 an "objectively unreasonable" application of *Jackson*. See *Juan H.*, 408 F.3d at 1275
 26 n.13.

27 Sufficiency of the evidence claims are judged by the elements defined by state
 28 law. *Jackson*, 443 U.S. at 324 n.16. Regarding count 1, involuntary manslaughter,

1 Nevada law provides that “involuntary manslaughter is the killing of a human being,
 2 without any intent to do so, in the commission of an unlawful act, or a lawful act which
 3 probably might produce such a consequence in an unlawful manner.” NRS § 200.070(1).
 4 Regarding counts 2 through 7, as was discussed partially in ground 1, Nevada law
 5 provides that child abuse or neglect is either (1) “willfully [causing] a child . . . to suffer
 6 unjustifiable physical pain or mental suffering as a result of abuse or neglect or [placing
 7 a child] in a situation where the child may suffer physical pain or mental suffering as the
 8 result of abuse or neglect,” or (2) “permit[ting] or allow[ing] a child to suffer unjustifiable
 9 physical pain or mental suffering as a result of abuse or neglect or [placing a child] in a
 10 situation where the child may suffer physical pain or mental suffering as the result of
 11 abuse or neglect.” Nev. Rev. Stat. § 200.508(1),(2). “Abuse or neglect” is defined as
 12 “physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation,
 13 negligent treatment or maltreatment of a child under the age of 18 years . . . under
 14 circumstances which indicate that the child’s health or welfare is harmed or threatened
 15 with harm.” NRS § 200.508(4)(a). And allow and permit are defined, respectively, as “to
 16 do nothing to prevent or stop the abuse or neglect of a child in circumstances where the
 17 person knows or has reason to know that the child is abused or neglected” and
 18 “permission that a reasonable person would not grant and which amounts to a neglect
 19 of responsibility attending the care, custody and control of a minor child.” NRS §
 20 200.508(4)(b),(c).

21 **2. State Court Determination**

22 In affirming Rimer’s judgment of conviction, the Nevada Supreme Court held:
 23 Rimer claims that the State failed to present evidence that he caused his
 24 children to suffer unjustifiable physical pain or mental suffering, permitted
 25 or allowed the abuse or neglect that resulted in [J.R.]’s death, and
 26 committed an act that led to [J.R.]’s death. We review the evidence in the
 27 light most favorable to the prosecution and determine whether a “rational
 28 trier of fact could have found the essential elements of the crime[s] beyond
 a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell
 v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Here, the jury heard
 testimony that revealed a pattern of child abuse and neglect. Rimer placed
 his children in harm’s way by subjecting them to deplorable living conditions,
 dispensing excessive corporal punishment, and concealing their unsafe and
 unhealthy environment from CPS. Rimer failed to provide adequate care

1 and supervision for his special-needs child, [J.R.], who required constant
 2 attention and yet was often left filthy, in need of clean diapers, and suffering
 3 from an unhealthy G-tube site. And, Rimer withdrew to his bedroom and
 4 failed to check on the condition and whereabouts of his special-needs child
 5 during the 17-hour period that preceded the discovery of the child's body.
 6 We conclude that sufficient evidence supports Rimer's conviction for child
 abuse and neglect and involuntary manslaughter. See NRS 200.070; NRS
 200.508. It is for the jury to determine the weight and credibility to give
 conflicting testimony, and the jury's verdict will not be disturbed on appeal
 where, as here, substantial evidence supports its verdict. See *Bolden v.*
State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

7 (ECF No. 18-7 at 20-21.)

8 **3. Analysis—Involuntary Manslaughter (count 1) and Child
 9 Neglect Resulting in Substantial Bodily Harm (count 2)**

10 Rimer argues that there is no evidence that he knew or had any reason to know
 11 of the tragic events unfolding in the Excursion on June 8, 2008. (ECF No. 17 at 28.)
 12 Even though Rimer came home early from church on June 8, 2008, and spent the
 13 remainder of the day in his bedroom, he had reason to question J.R.'s whereabouts and
 14 wellbeing because (1) Colleen spent most of the remainder of June 8, 2008 also in the
 15 bedroom with Rimer, (2) J.R. was not present in the bedroom with his parents, (3) J.R.
 16 had special needs and required constant attention, and (4) there was no other adult in
 17 the residence to care for J.R.

18 Regarding count 1, viewing the evidence "in the light most favorable to the
 19 prosecution" (*Jackson*, 443 U.S. at 319), which would support a finding that J.R. died
 20 due to Rimer's unlawful act of passive child neglect, the Nevada Supreme Court's
 21 determination that sufficient evidence supported Rimer's involuntary manslaughter
 22 conviction was not based on an unreasonable determination of the facts and constitutes
 23 an objectively reasonable application of clearly established federal law. *In re Winship*,
 24 397 U.S. at 364; *Juan H.*, 408 F.3d at 1274; Nev. Rev. Stat. § 200.070(1).

25 Regarding count 2, again viewing the evidence "in the light most favorable to the
 26 prosecution" (*Jackson*, 443 U.S. at 319), which would support a finding that Rimer was
 27 responsible for the safety and welfare of his son, J.R., and permitted or allowed J.R. to
 28 suffer unjustifiable physical pain as a result of neglect resulting in substantial bodily

1 harm, the Nevada Supreme Court's determination that sufficient evidence supported
 2 Rimer's conviction in count 2 was not based on an unreasonable determination of the
 3 facts and constitutes an objectively reasonable application of clearly established federal
 4 law. *In re Winship*, 397 U.S. at 364; *Juan H.*, 408 F.3d at 1274; NRS § 200.508(2).

5 **4. Analysis—Child Abuse or Neglect (counts 3-7)**

6 Regarding J.R., who had special needs, there was evidence admitted that J.R.
 7 was often filthy, was often left in soiled diapers, and was left without adult supervision.
 8 When J.R. was an infant, his G-tube site was not adequately cleaned, causing the site
 9 to be "necrotic looking" and causing J.R. discomfort. Regarding A.R., who also had
 10 special needs, there was evidence admitted that he suffered from body lice on at least
 11 one occasion, was sent to school with no shoes, was left without adult supervision, and
 12 was not provided lunch, money, or a free-lunch form for him to eat at school. Regarding
 13 Q.R., there was evidence admitted that Rimer called him the Devil. And regarding the
 14 children generally, there was evidence admitted that Rimer would commonly spank the
 15 children with a four-foot-long oar up to 50 times, that Rimer would occasionally punch
 16 the children with a closed fist, that Rimer would send the children to bed without dinner
 17 as punishment, that the Rimer household had issues with lice for years, and that the
 18 Rimer residence was unsanitary. Regarding the last point, there was evidence admitted
 19 that the residence contained unnecessary debris, was excessively cluttered, was
 20 unsafe, was dirty, and often had uncleaned animal feces on the floors.

21 Viewing this evidence "in the light most favorable to the prosecution" (*Jackson*,
 22 443 U.S. at 319), which would support a finding that Rimer willfully caused or placed his
 23 children, J.R., S.R., E.R., Q.R., and A.R., in a situation where they could suffer
 24 unjustifiable physical pain or mental suffering as a result of abuse or neglect, the Nevada
 25 Supreme Court's determination that sufficient evidence supported Rimer's convictions
 26 in counts 3-7 was not based on an unreasonable determination of the facts and
 27 constitutes an objectively reasonable application of clearly established federal law. *In re*
 28 *Winship*, 397 U.S. at 364; *Juan H.*, 408 F.3d at 1274; NRS § 200.508(1).

1 In sum, Rimer is not entitled to federal habeas relief for ground 2.

2 **C. Ground 3—Constitutionality of Nevada’s Child Abuse or Neglect
3 Statute**

4 In ground 3, Rimer alleges that Nevada’s child abuse or neglect statute is
5 unconstitutionally vague. (ECF No. 17 at 32.)

6 **1. Vagueness Standard**

7 “[T]he Government violates [due process of law] by taking away someone’s life,
8 liberty, or property under a criminal law so vague that it fails to give ordinary people fair
9 notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”

10 *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015); see also *Giaccio v. Pennsylvania*,
11 382 U.S. 399, 402-03 (1966) (“It is established that a law fails to meet the requirements
12 of the Due Process Clause if it is so vague and standardless that it leaves the public
13 uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without
14 any legal fixed standards, what is prohibited and what is not in each particular case.”).

15 This principle applies “to statutes defining elements of crimes” and “to statutes fixing
16 sentences.” *Johnson*, 135 S.Ct. at 2557. Regarding the former, “the void-for-vagueness
17 doctrine requires that a penal statute define the criminal offense with sufficient
18 definiteness that ordinary people can understand what conduct is prohibited and in a
19 manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v.*
20 *Lawson*, 461 U.S. 352, 357 (1983); see also *Hess v. Bd. of Parole & Post-Prison*
21 *Supervision*, 514 F.3d 909, 913 (9th Cir. 2008) (“[A] state law must establish adequate
22 guidelines to govern the exercise of discretion by state officials so that the law neither
23 ‘authorizes [n]or even encourages arbitrary and discriminatory enforcement.’” (quoting
24 *Hill v. Colorado*, 530 U.S. 703, 732 (2000))).

25 **2. State Court Determination**

26 In affirming Rimer’s judgment of conviction, the Nevada Supreme Court held:

27 Rimer claims that NRS 200.508 is unconstitutionally vague because no
28 reasonable person would understand the prohibition on child abuse and
neglect to include leaving a child in the care of his or her mother or
criminalizing foul odors, cluttered houses, dirty aquariums, low food

1 supplies, sending children to bed without supper, calling children
 2 nonprofane names, spanking children, or failing to expediently eradicate a
 3 lice problem. “We review the constitutionality of a statute de novo,
 4 presuming that a statute is constitutional.” *Clancy v. State*, 129 Nev., Adv.
 5 Op. 89, 313 P.3d 226, 231 (2013). Nevada’s child-abuse-and-neglect
 6 statute plainly authorizes criminal penalties for an adult who either willfully
 7 or passively places a child “in a situation where the child may suffer physical
 8 pain or mental suffering as the result of abuse or neglect,” NRS 200.508(1),
 9 (2), and adequately defines its terms so that a person of ordinary
 10 intelligence would have notice of the prohibited conduct. *Smith v. State*, 112
 11 Nev. 1269, 1276, 927 P.2d 13, 18 (1996), abrogated on other grounds by
 12 *City of Las Vegas v. Eighth Judicial Dist. Court*, 118 Nev. 859, 862-63, 59
 13 P.3d 477, 480 (2002), abrogated on other grounds by *State v. Castaneda*,
 14 126 Nev. 478, 482 n.1, 245 P.3d 550, 553 n.1 (2010). Consequently, we
 15 conclude that Rimer has failed to make a clear showing that the statute is
 16 unconstitutional as applied to him or otherwise overcome the statute’s
 17 presumed constitutionality. See *Clancy*, 129 Nev., Adv. Op. 89, 313 P.3d at
 18 231 (setting forth the test for unconstitutional vagueness).

19 (ECF No. 18-7 at 22.)

20 3. Analysis

21 As the Nevada Supreme Court reasonably determined, NRS §§ 200.508(1), (2),
 22 which this court outlined in grounds 1 and 2, plainly defines child abuse or neglect as
 23 either (1) willfully causing a child to “suffer unjustifiable physical pain or mental suffering
 24 as a result of abuse or neglect” or placing a child “in a situation where the child may
 25 suffer physical pain or mental suffering as the result of abuse or neglect,” or (2) passively
 26 permitting or allowing a “child to suffer unjustifiable physical pain or mental suffering as
 27 a result of abuse or neglect” or placing a child “in a situation where the child may suffer
 28 physical pain or mental suffering as the result of abuse or neglect.” And NRS §
 200.508(4) then defines “abuse or neglect,” “allow,” “permit,” “physical injury,” and
 “substantial bodily harm.”

29 Rimer fails to demonstrate that NRS § 200.508 (1) does not define child abuse
 30 or neglect “with sufficient definiteness” or (2) “encourage[s] arbitrary and discriminatory
 31 enforcement.” *Kolender*, 461 U.S. at 357; see, e.g., *Bush v. Wolfson*, Case No. 2:19-cv-
 32 01096-RFB-VCF, 2020 WL 1324990, at *9 (D. Nev. Mar. 20, 2020) (determining that
 33 NRS § 200.508 is not unconstitutional). Thus, the Nevada Supreme Court’s
 34 determination that Rimer failed to show that NRS § 200.508 is unconstitutional was

1 neither contrary to, nor an unreasonable application of, clearly established federal law.
 2 Rimer is not entitled to federal habeas relief for ground 3.

3 **D. Ground 4—Joinder of Charges**

4 In ground 4, Rimer alleges that his right to due process and a fair trial were violated
 5 when the state district court refused to sever the child abuse or neglect charges (counts
 6 3-7, “abuse charges”) from the charges relating to J.R.’s death (counts 1-2, “death
 7 charges”). (ECF No. 17 at 35.) Rimer moved to sever the death charges from the abuse
 8 charges before trial, arguing that “[t]here is an obvious and substantial risk that a jury
 9 could look at the child abuse counts, and determine that based upon them [Rimer] was a
 10 bad man, and use that determination to convict him of the more serious murder charge.”
 11 (ECF No. 28-31 at 17.) The state district court denied the motion to sever the counts,
 12 finding that “there is an element of allegations of neglect in all of” the counts and
 13 concluding that the evidence of both sets of charges would be cross-admissible even if
 14 the counts were severed and tried separately. (ECF No. 29-4 at 28.)

15 **1. Severance of Counts Standard**

16 The Supreme Court cross-applies its reasoning for relief from prejudicial joinder in
 17 cases involving severance of counts and severance of defendants. See *United States v.*
 18 *Lane*, 474 U.S. 438 (1986) (addressing allegedly misjoined counts); *Zafiro v. United*
 19 *States*, 506 U.S. 534, 539 (1993) (addressing allegedly misjoined defendants, citing to
 20 *Lane*). The Supreme Court has stated in a footnote: “Improper joinder does not, in itself,
 21 violate the Constitution. Rather, misjoinder would rise to the level of a constitutional
 22 violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment
 23 right to a fair trial.” *Lane*, 474 U.S. at 466 n.8 (1986); see also *Zafiro*, 506 U.S. at 539
 24 (holding that a court should grant a severance under Federal Rule of Criminal Procedure
 25 14 “only if there is a serious risk that a joint trial would compromise a specific trial right of
 26 one of the defendants, or prevent the jury from making a reliable judgment about guilt or
 27 innocence”).

28 ///

The Ninth Circuit has declared this statement in *Lane* to be dicta and held that “neither *Zafiro v. United States* nor *United State v. Lane* establish a constitutional standard binding on the state requiring severance in cases where defendants present mutually antagonistic defense.” *Collins v. Runnels*, 603 F.3d 1127, 1132-33 (9th Cir. 2010); see also *Runningeagle v. Ryan*, 686 F.3d 758, 774 (9th Cir. 2012) (“[T]here is no clearly established federal law requiring severance of criminal trials in state court even when the defendants assert mutually antagonistic defenses.”). This holding also appears to apply to severance of charges. See *Martinez v. Yates*, 585 F. App’x 460, 460 (9th Cir. 2014) (“There is no clearly established Supreme Court precedent dictating when a trial in state court must be severed.”); see also *Grajeda v. Scribner*, 541 F. App’x 776, 778 (9th Cir. 2013) (“The Supreme Court has not held that a state or federal trial court’s denial of a motion to sever can, in itself, violate the Constitution.”).

Because there is no clearly established Supreme Court precedent, Rimer has not shown that the Nevada Supreme Court acted contrary to Supreme Court precedent in determining that he was not entitled to relief on his severance claims. See 28 U.S.C. § 2254(d)(1); see also *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (explaining that “it cannot be said that the state court unreasonably applied clearly established Federal law” when United States Supreme Court precedent “give[s] no clear answer to the question presented” (internal quotation marks and alterations omitted)).

2. State Court Determination

Regarding ground 4, in affirming Rimer’s judgment of conviction, the Nevada Supreme Court held:

Rimer claims that the district court erred by denying his pretrial motion to sever the child-abuse-and-neglect counts (the abuse charges) from the second-degree-murder and child-abuse-and-neglect-causing-substantial-bodily-harm counts (the death charges). Rimer argued in the court below that the abuse charges and the death charges were improperly joined under NRS 173.115 and, alternatively, even if the initial joinder was proper, severance was required by NRS 174.165(1) because the joinder was unfairly prejudicial.

A. Standard of review

The decision to join or sever charges falls within the district court's discretion. *Weber v. State*, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005). We review the exercise of this discretion by determining whether a proper basis for the joinder existed and, if so, whether unfair prejudice nonetheless mandated separate trials. *Id.* at 571, 119 P.3d at 119. We base our review on the facts as they appeared at the time of the district court's decision. See *People v. Boyde*, 758 P.2d 25, 34 (Cal. 1988); *People v. Brawley*, 461 P.2d 361, 369-70 (Cal. 1969) ("[T]he propriety of the denial of a motion for separate trials must, of course, be tested as of the time of the submission of the motion, and the question of error cannot be determined in the context of subsequent developments at the trial." (citations omitted)). And, if we conclude that the charges were improperly joined, we review for harmless error and reverse only if "the error had a substantial and injurious effect or influence in determining the jury's verdict." *Tabish v. State*, 119 Nev. 293, 302, 72 P.3d 584, 590 (2003) (internal quotations omitted); see also *United States v. Lane*, 474 U.S. 438, 449 (1986).

B. Bases for joinder

A proper basis for joinder exists when the charges are "[b]ased on the same act or transaction; or . . . [based] on two or more acts or transactions connected together or constituting parts of a common scheme or plan." NRS 173.115. Here, the abuse charges and the death charges are not based on the same act or transaction and the facts do not demonstrate that Rimer had a single scheme or plan encompassing the abuse of his children and the death of his four-year-old son. Consequently, the charges are only properly joined if they are "connected together."

1. Connected together

In *Weber*, we clarified that "for two charged crimes to be 'connected together' under NRS 173.115(2), a court must determine that evidence of either crime would be admissible in a separate trial regarding the other crime." 121 Nev. at 573, 119 P.3d at 120. We also stated that evidence of a crime may be admissible in a trial for another crime if it is admissible under NRS 48.045(2) and satisfies the requirements in *Tinch* by being "relevant, . . . proven by clear and convincing evidence, and [having] probative value that is not substantially outweighed by the risk of unfair prejudice." *Id.* (citing *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). However, in stating this test for the admissibility of evidence of other crimes, we failed to consider the difference between the procedural issue of joinder of offenses and the evidentiary issue of admitting evidence of "other crimes." See *Solomon v. State*, 646 A.2d 1064, 1066 (Md. Ct. Spec. App. 1994) (observing that the procedural issues of joinder and severance are not the same as the evidentiary issue of "other crimes" evidence and they call for different analyses).

The admissibility of evidence of "other crimes, wrongs or acts" is an evidentiary issue that may arise at any time during the course of a trial, and the district court's evaluation of that evidence's relevance, reliability, and risk of unfair prejudice is necessary to ensure that the evidence is subjected to some form of procedural safeguard before it has a chance to influence the jury. See *Petrocelli v. State*, 101 Nev. 46, 51 n.3, 51-52, 692 P.2d 503, 507 n.3, 507-08 (1985) (quoting NRS 48.045(2)), superseded in part by statute as stated in *Thomas v. State*, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004). In contrast, the joinder of offenses is a procedural issue that is decided before a trial and does not compel the same safeguards as

1 evidence that is introduced after a trial has started. See generally *Brown v.*
 2 *State*, 114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998) (recognizing
 joinder as a procedural rule).

3 In a joinder decision there is no need to prove a defendant's
 participation in the charged crimes by clear and convincing evidence
 because "[a]ll crimes charged, and, therefore, amenable to the possible
 joinder, are the considered products of grand jury indictments or criminal
 informations" and therefore are "of equal stature." *Solomon*, 646 A.2d at
 1070; accord *State v. Cutro*, 618 S.E.2d 890, 894 (S.C. 2005). Similarly,
 weighing the probative value of the evidence against the danger of unfair
 prejudice does not provide a meaningful safeguard against improper joinder
 because it fails to account for the public's weighty interest in judicial
 economy, see *Tabish*, 119 Nev. at 304, 72 P.3d at 591; *Solomon*, 646 A.2d
 at 1071, and the question of unfair prejudice can be addressed separately
 through the prejudicial joinder statute, NRS 174.165(1). However, the
 district court must still consider whether the evidence of either charge would
 be admissible for a relevant, nonpropensity purpose in a separate trial for
 the other charge, see generally *Bigpond v. State*, 128 Nev., Adv. Op. 10,
 270 P.3d 1244, 1249-50 (2012) (modifying the first *Tinch* factor to reflect
 the narrow limits of the general rule of exclusion), but we conclude that this
 is the only *Tinch* factor that the district court must consider when deciding
 whether charges are "connected together" for purposes of joinder.

12 2. Admissibility and relevancy

13 "The admissibility of evidence of other crimes, wrongs, or acts to
 establish intent and an absence of mistake or accident is well established,
 particularly in child abuse cases," *United States v. Harris*, 661 F.2d 138, 142
 (10th Cir. 1981), where the State must often "prove its case, if at all, with
 circumstantial evidence amidst a background of a pattern of abuse," *United
 States v. Merriweather*, 22 M.J. 657, 663 (A.C.M.R. 1986) (Naughton, J.,
 concurring). See *Bludsworth v. State*, 98 Nev. 289, 291, 646 P.2d 558, 559
 (1982) (evidence of prior injuries is admissible as "independent, relevant
 circumstantial evidence tending to show that the child was intentionally,
 rather than accidentally, injured on the day in question"); *Ashford v. State*,
 603 P.2d 1162, 1164 (Okla. Crim. App. 1979) (evidence of "past injuries [is]
 admissible to counter any claim that the latest injury happened through
 accident or simple negligence. The pattern of abuse is relevant to show the
 intent of the act."); *State v. Widdison*, 4 P.3d 100, 108 (Utah Ct. App. 2000)
 ("Evidence of prior child abuse, both against the victim and other children,
 is admissible to show identity, intent, or lack of accident or mistake."); see
 also *State v. Taylor*, 701 A.2d 389, 395-96 (Md. 1997) (gathering cases).
 Here, the abuse charges and the death charges were connected together
 because evidence from these charges demonstrated a pattern of abuse and
 neglect that would have been relevant and admissible in separate trials for
 each of the charges. Accordingly, we conclude that the joinder of these
 charges was permissible under NRS 173.115.

25 C. Prejudicial joinder

26 Even when charges have been properly joined, some form of relief
 27 may be necessary to avert unfair prejudice to the defendant. NRS
 28 174.165(1) provides that "[i]f it appears that a defendant . . . is prejudiced
 by a joinder of offenses . . . in an indictment . . . , the court may order an
 election or separate trials of counts, . . . or provide whatever other relief
 justice requires." The defendant must demonstrate to the district court that

1 the joinder would be unfairly prejudicial; this requires more than a mere
 2 showing that severance may improve his or her chances for acquittal.
 3 *Weber*, 121 Nev. at 574-75, 119 P.3d at 121. Courts construing NRS
 4 174.165(1)'s federal cognate

5 have identified three related but distinct types of prejudice that
 6 can flow from joined counts: (1) the jury may believe that a
 7 person charged with a large number of offenses has a criminal
 8 disposition, and as a result may cumulate the evidence
 9 against him or her or perhaps lessen the presumption of
 10 innocence; (2) evidence of guilt on one count may "spillover"
 11 to other counts, and lead to a conviction on those other counts
 12 even though the spillover evidence would have been
 13 inadmissible at a separate trial; and (3) defendant may wish
 14 to testify in his or her own defense on one charge but not on
 15 another.

16A Charles Alan Wright & Andrew D. Leipold, *Federal Practice and*
 17 *Procedure* § 222 (4th ed. 2008). We have recognized that the first of these
 18 types of prejudice may occur when charges in a weak case have been
 19 combined with charges in a strong case to help bolster the former. *Weber*,
 20 121 Nev. at 575, 119 P.3d at 122.

21 Like its federal counterpart, NRS 174.165(1) "does not require
 22 severance even if prejudice is shown; rather, it leaves the tailoring of the
 23 relief to be granted, if any, to the district court's sound discretion." *Zafiro v.*
United States, 506 U.S. 534, 538-39 (1993). "To require severance, the
 24 defendant must demonstrate that a joint trial would be manifestly prejudicial.
 25 The simultaneous trial of the offenses must render the trial fundamentally
 26 unfair, and hence, result in a violation of due process." *Honeycutt v. State*,
 27 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002) (emphasis added) (internal
 28 quotations omitted), overruled on other grounds by *Carter v. State*, 121 Nev.
 759, 765, 121 P.3d 592, 596 (2005). To resolve a motion to sever, the
 29 district court must first determine whether the joinder is manifestly
 30 prejudicial in light of the unique facts of the case and then decide "whether
 31 [the] joinder is so manifestly prejudicial that it outweighs the dominant
 32 concern [of] judicial economy and compels the exercise of the court's
 33 discretion to sever." *Tabish*, 119 Nev. at 304, 72 P.3d at 591 (internal
 34 quotation omitted).

35 Here, the district court expressly rejected the argument that the
 36 abuse charges unfairly bolstered the death charges because Rimer was
 37 directly implicated in the abuse charges but only indirectly implicated in the
 38 death charges. Our review of the record shows that all of the charges were
 39 strong and none of the charges were so weak as to suggest a due process
 40 violation. Accordingly, we conclude that the district court did not abuse its
 41 discretion in this regard.

42 (ECF No. 18-7 at 14-20.)

43 3. Analysis

44 Rimer has shown that the state district court's decision not to sever the death
 45 charges from the abuse charges resulted in a prejudice so great that he was deprived of
 46 a fair trial. Moreover, Rimer has shown that the Nevada Supreme Court's failure to
 47 conduct an adequate review of the state court's decision denying the motion to sever

counts resulting in an unreasonable application of federal law. But because it is not clear that the law requiring severance of counts is clearly established, the Court must deny relief for ground 4. Because the Court would grant Rimer relief on ground 4 if the law were clearly established, the Court will issue a certificate of appealability so that Rimer may seek review from the Ninth Circuit.

a. The State District Court's Analysis

Before his trial, Rimer challenged joinder of the abuse charges with the death charges, reasoning that in a severed trial, evidence of earlier abuse or neglect of J.R. and the other children would be inadmissible as either other wrongful acts or as more prejudicial than probative of guilt on the death charges. (ECF No. 29-4 at 15-16.) The prosecutor argued that because abuse and neglect was ongoing and was a shared element between all the charges, evidence of the related conduct would be admissible to show that any mistake or accident Rimer claimed caused him to fail to look for J.R. would be unreasonable. (*Id.* at 19-20.) At the hearing on the motion, the prosecutor clarified that it sought to prove the Rimers “were neglectful” on the day of J.R.’s death, as opposed to committing “an affirmative act of abuse.” (*Id.* at 20.) Because each charge was based on the ongoing neglect, the prosecutor argued the evidence of the charges would be cross-admissible. (*Id.* at 21.) In response, defense counsel argued that what the prosecutor was seeking to do was introduce propensity evidence. (*Id.* at 23.) Moreover, even if the evidence were admissible for a non-propensity purpose, “the prejudice would be so high” that it would not come in during a severed trial. (*Id.*) The state district court agreed with the prosecutor that the evidence would be cross-admissible. (*Id.* at 21, 28-29.)

b. The Nevada Supreme Court's Unreasonable Application of Federal Law

The Court considers whether the Nevada Supreme Court's decision to deny relief was contrary to, or involved an unreasonable application of, federal law. See 28 U.S.C. § 2254(d)(1). The Court finds that it was.

111

1 The Nevada Supreme Court broke its analysis into two questions: (1) whether the
2 counts were initially misjoined, and (2) even if they were properly joined, whether they
3 should have been severed because joinder would unduly prejudice the defendant. (ECF
4 No. 18-7 at 14-20.) In reviewing the first question, the court determined the counts were
5 appropriately joined because they were “connected together” by forming a pattern of
6 abuse. (*Id.* at 16.) Finding that the counts are “connected together” required the Nevada
7 Supreme Court to decide that the evidence would be cross-admissible for non-propensity
8 purposes, but did not require the court to determine whether the evidence would be
9 otherwise excluded as more prejudicial than probative. That analysis was ostensibly
10 reserved for the prejudicial joinder prong, but the Nevada Supreme Court omitted it there
11 as well.

12 The Court does not review whether the counts were initially misjoined and focuses
13 instead on whether the failure to sever the counts resulted in prejudice so great that Rimer
14 was deprived of a fair trial. However, the Nevada Supreme Court did not review the state
15 district court’s determination that no prejudice would result because the evidence would
16 be cross-admissible at hypothetically severed trials. Instead, the Nevada Supreme Court
17 substituted its own findings on an entirely different source of prejudice—whether any
18 weaker charges were improperly bolstered by joining them with stronger charges. (*Id.* at
19 19.) Nowhere in the hearing transcript does either party or the trial court itself discuss the
20 risk of evidence spillover bolstering a weaker charge with evidence from a stronger
21 charge. (See ECF No. 29-4.) While evidentiary spillover may be a source of prejudice, it
22 is not the only source the U.S. Supreme Court or the Ninth Circuit have recognized, nor
23 was it the source initially argued in this case. Indeed, the introduction of evidence which
24 is relevant but that would otherwise be excluded in a severed trial is a source of potential
25 prejudice the U.S. Supreme Court has expressly recognized. See *Zafiro*, 506 U.S. at 539.
26 The Nevada Supreme Court’s prejudice analysis was incomplete based on the procedural
27 history and facts of this case. Even assuming the evidence were sufficient to convict
28 Rimer on every count and the court was correct that no weaker charges were improperly

1 bolstered, prejudice still could have resulted from the introduction of inflammatory
 2 evidence that would have been excluded in severed trials.

3 It is possible that the Nevada Supreme Court failed to conduct a thorough prejudice
 4 analysis because it had already determined the evidence would be cross-admissible
 5 under the initial misjoinder analysis. Before reaching the prejudice prong, the Nevada
 6 Supreme Court found the counts were properly joined in part because evidence from the
 7 abuse charges would be cross-admissible in a trial for the death charges. (ECF No.18-7
 8 at 16.) Again, the Court need not review whether the counts were initially misjoined, as
 9 the focus of Rimer's collateral habeas claim is prejudice. See *Estelle v. McGuire*, 502
 10 U.S. 62, 71-72 (1991) (explaining that federal habeas courts grant relief based on the
 11 deprivation of federal rights, not based on incorrect state law determinations). However,
 12 because the Nevada Supreme Court failed to examine whether evidence would be
 13 excluded in severed trials, the Court looks to the Nevada Supreme Court's cross-
 14 admissibility analysis as explained in the initial misjoinder section.

15 The Nevada Supreme Court's determination that evidence from one set of charges
 16 would be cross-admissible in a severed trial for the other set is erroneous under federal
 17 law.¹⁰ The court reasoned that the evidence from the abuse charges would be cross-

19 ¹⁰To the extent that it is relevant, the Nevada Supreme Court's findings on this
 20 question are not insulated from federal review because its state law determinations are
 21 not sufficiently "independent" of federal law. See *Coleman v. Thompson*, 501 U.S. 722,
 22 729-735 (1991) (holding that "federal courts on habeas corpus review of state prisoner
 23 claims, like this Court on direct review of state court judgments, will presume that there is
 no independent and adequate state ground for a state court decision when the decision
 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law,
 and when the adequacy and independence of any possible state law ground is not clear
 from the face of the opinion'" (quoting *Michigan v. Long*, 463 U.S. 1032, 1038 (1983))).

24 The Nevada Supreme Court cited cases applying federal law, Nevada law,
 25 Oklahoma law, Utah law, and Maryland law to find that evidence of other wrongs "to
 establish intent and absence of mistake or accident is well established, particularly in child
 26 abuse cases . . . where the State must often prove its case, if at all, with circumstantial
 evidence amidst a background of a pattern of abuse." (ECF No. 18-7 at 17-18.) Moreover,
 27 the Nevada statute governing proper joinder of offenses in a criminal complaint or
 indictment is nearly identical to Federal Rule of Criminal Procedure 8. See NRS §
 28 173.115. The Court therefore may consider whether it is correct that the Nevada Supreme
 Court's determination that evidence from one set of charges would be cross-admissible
 for non-propensity purposes, and how that determination affected the overall prejudice to
 Rimer.

1 admissible in a severed death charges trial because evidence of other wrongs is
2 frequently introduced to prove intent in child abuse cases. (ECF No. 18-7 at 16.) But intent
3 was not part of the prosecution's theory in this case, nor was it required to prove the death
4 charges. The state district court noted repeatedly, and the prosecutor conceded, the
5 connection between the abuse charges and the death charges was neglect. They were
6 not attempting to show that either Rimer or Colleen intended to kill J.R.; rather, that they
7 were neglectful parents who routinely neglected their children, and therefore they
8 unreasonably neglected J.R. on the day he died. The evidence was not offered to prove
9 intent, as the prosecutor was arguing that the neglect of J.R. was not intentional. Nor was
10 it offered to show lack of accident or mistake, neither of which would be required to prove
11 the death charges. Instead, evidence of the abuse charges would be offered to show that
12 Rimer and Colleen acted in this instance in conformity with prior neglectful and abusive
13 acts. This line of argument is prohibited by Federal Rule of Evidence 404(b)(2) and its
14 analogue in Nevada law, NRS § 48.045(2), and almost certainly would have been
15 excluded in severed trials.

16 After concluding that the evidence would be cross-admissible for non-propensity
17 purposes, the Nevada Supreme Court never returned to the question of cross-
18 admissibility or how the potential that some evidence may be excluded in severed trials
19 affects the prejudice analysis. The court did not balance whether otherwise admissible
20 evidence would be excluded from a severed trial because it was more prejudicial than
21 probative, despite indicating that such analysis was proper under the prejudicial joinder
22 prong. (ECF No. 18-7 at 17.) Even assuming the evidence of the abuse charges could be
23 offered for a non-propensity purpose, it is not at all clear that the evidence would be more
24 probative than prejudicial. As defense counsel argued at the hearing, the instances of
25 abuse of the other Rimer children were not factually similar to the neglect that resulted in
26 J.R.'s death. Many of the facts involved affirmative acts of abuse, including corporeal
27 punishment. Such evidence was not necessary to show that either Rimer or Colleen
28 criminally neglected J.R. the day he died. Moreover, the evidence relating to the abuse

1 of the other children would be highly inflammatory and of little probative value to show
2 that Rimer was responsible for J.R.’s death. And, as Rimer points out in his Petition, the
3 inverse is true as well—had the counts been severed, the jury hearing the abuse charges
4 almost certainly would not have heard evidence of J.R.’s death. It is difficult to imagine a
5 situation where a jury is more likely to be prejudiced than when hearing evidence that a
6 defendant was potentially responsible for leaving his four-year-old son with special needs
7 in a hot car for 17 hours in a trial for neglect or abuse of his surviving children.

8 Evidence of other wrongs is presumptively highly prejudicial, to such a degree that
9 the Federal Rules of Evidence prohibit its introduction except in limited circumstances.
10 See, e.g., *United States v. Charley*, 1 F.4th 637, 647-48 (9th Cir. 2021) (reversing
11 defendant’s conviction when the district court improperly permitted evidence of other
12 wrongs that did not fall within an enumerated exception). “Courts must be extremely
13 careful to guard against the danger that defendants will be convicted because they have
14 previously committed a [prior] serious criminal offense rather than because the
15 Government has introduced evidence sufficient to prove beyond a reasonable doubt.” *Id.*
16 (citation omitted). “Even where 404(b) evidence falls within a permitted purpose, it should
17 be excluded under Rule 403, if the court finds that its probative value is substantially
18 outweighed by a danger of unfair prejudice.” *United States v. Preston*, 873 F.3d 829, 840
19 (9th Cir. 2017). The Ninth Circuit has further clarified in the habeas context that it is
20 exceedingly difficult for jurors to compartmentalize “damaging information about one
21 defendant derived from joined counts,” especially when that evidence would not have
22 been cross-admissible in severed trials and the charges are not sufficiently “simple and
23 distinct.” *Bean*, 163 F.3d at 1084-85. Here, the charges were not simple and distinct, as
24 the prosecution’s theory of the case relied upon drawing together a pattern of neglect
25 across charges. Moreover, the nature of child abuse and neglect charges create a higher
26 risk that a jury’s emotions will be inflamed, creating a greater likelihood that the jury would
27 draw improper conclusions based on Rimer’s character. It is difficult to imagine a
28 circumstance in which this risk is greater than introducing evidence that a defendant may

1 have been responsible for the death of his own child who was only four years old in a trial
 2 for the neglect of his other children. But as explained above, the Nevada Supreme Court
 3 never considered whether evidence of the abuse charges would be more prejudicial than
 4 probative in a severed trial for the death counts, or whether evidence of J.R.'s death would
 5 be more prejudicial than probative in a trial for the abuse of the Rimer children preceding
 6 J.R.'s death.

7 Finally, although the Nevada Supreme Court did not address whether the general
 8 jury instructions cured any potential prejudice from the failure to sever the counts, the
 9 Court finds they likely did not. While “[a] habeas court must presume that jurors follow the
 10 jury instructions,” *Busby*, 661 F.3d at 1017, the Ninth Circuit has expressed doubt that
 11 general instructions are sufficient to cure prejudice in joined trials where the joinder
 12 creates prejudice. Although the jury instructions may have had some curative effect, both
 13 the Supreme Court and the Ninth Circuit have cautioned that “proper jury instructions
 14 might not alleviate the problems inherent in joint trials.” *Lane*, 474 U.S. 458, n.22 (1986)
 15 (quoting *Blumenthal v. United States*, 332 U.S. 539, 559 (1986)); *Bean*, 163 F.3d at (“We
 16 have expressed our skepticism about the efficacy of [general] instructions . . . ‘To tell a
 17 jury to ignore the defendant’s prior convictions in determining whether he or she
 18 committed the offense being tried is to ask human beings to act with a measure of
 19 dispassion and exactitude beyond mortal capacities.’”) (quoting *United States v. Lewis*,
 20 787 F.2d 1318, 1322 (9th Cir. 1986)). This risk is particularly acute when the evidence
 21 between charges or against separate defendants would not be cross-admissible, as well
 22 as when the crimes charged are not “simple and distinct.” *Bean*, 163 F.3d at 1085. Here,
 23 the initial basis for joinder of the counts was to demonstrate a pattern of abuse and neglect,
 24 precisely the type of justification which would invite the jury to draw connections between
 25 distinct acts. The Court agrees with the Ninth Circuit’s reasoning in *Bean* and finds that
 26 instructing jurors to compartmentalize such inflammatory evidence is an unreasonable
 27 request and one that is unlikely to be particularly curative of the initial prejudice.
 28 ///

1 In sum, the failure to sever the death charges from the abuse charges prejudiced
 2 Rimer to such a degree that he was deprived of a fair trial. Moreover, the Nevada
 3 Supreme Court's failure to adequately consider the prejudice caused by failing to sever
 4 the counts unreasonably applied federal law—the U.S. Supreme Court has clearly stated
 5 that failing to sever counts, in certain circumstances, risks violating a defendant's due
 6 process right to a fair trial. See *Lane*, 474 U.S. at 446 n.8; *Zafiro*, 506 U.S. at 539-40. If
 7 the jury is “prevent[ed] from making a reliable judgment about guilt or innocence,” the
 8 defendant’s rights may be compromised. *Zafiro*, 506 U.S. at 539. Despite this finding that
 9 Rimer was prejudiced and the Nevada Supreme Court failed to adequately address the
 10 prejudice in its habeas review, it is unclear whether the Supreme Court caselaw
 11 explaining prejudicial joinder is “clearly established” such that relief is warranted under §
 12 2254(d)(1). Because the Ninth Circuit suggests the law is not clearly established, the
 13 Court will deny relief for ground 4. However, the Court will issue a certificate of
 14 appealability so that Rimer may seek review of this ground.

15 **E. Ground 5—Joinder of Defendants**

16 In ground 5, Rimer alleges that his right to due process and a fair trial were
 17 violated when the state district court refused to sever his trial from Colleen’s trial. (ECF
 18 No. 17 at 35.) Before trial, Rimer argued that “the defendants have mutually exclusive
 19 and antagonistic defenses” such that “acceptance of Colleen Rimer’s defense would
 20 preclude [his] acquittal.” (ECF No. 28-30 at 4.) The state district court denied the motion,
 21 finding “there’s [not] anything so inconsistent in these defenses or so inherently
 22 prejudicial to either Defendant of going to trial together.” (ECF No. 29-4 at 12-13.)

23 The same legal standards apply to the joinder and severance of defendants as
 24 counts; the Court incorporates those standards set forth in ground 4 into this section.
 25 Accordingly, Rimer must also demonstrate that the Nevada Supreme Court’s conclusion
 26 that the state district court did not abuse its discretion in finding the defenses were not
 27 inherently prejudicial was contrary to or an unreasonable application of clearly established
 28 federal law or based on an unreasonable determination of the facts. The Court finds that

1 not only were the defenses clearly mutually antagonistic and mutually exclusive, but
 2 that hearing both parents claim they were not responsible for J.R.'s death would increase
 3 the likelihood that the jury would find both parents guilty. Moreover, Colleen's defense
 4 that she had to rely on others in the home given the limitations due to her myotonic
 5 dystrophy would also increase the likelihood that the jury would find her more sympathetic
 6 and would shift responsibility to Rimer as the only other adult in the home as Rimer
 7 contends. (ECF No. 17 at 39.) While mutually antagonistic defenses are not per se
 8 prejudicial, the Court finds that in this case, Rimer and Colleen's defenses required
 9 severance for Rimer to receive a fair trial. But because the Ninth Circuit has suggested
 10 this law is not clearly established, the Court will deny ground 5, explain its reasoning, and
 11 grant a certificate of appealability.

12 **1. State Court Determination**

13 In affirming Rimer's judgment of conviction, the Nevada Supreme Court held:
 14 Rimer claims that the district court's failure to sever the joint trial deprived
 15 him of a fair trial because Colleen's inculpatory statement to police
 16 detectives was admitted into evidence, he and Colleen had mutually
 17 exclusive defenses, and the nature of their defenses gave rise to an
 18 inference that they were both guilty. We review a district court's
 19 determination of whether to sever a joint trial for abuse of discretion.
Chartier v. State, 124 Nev. 760, 763-64, 191 P.3d 1182, 1184-85 (2008). A
 20 joint trial must be severed "if there is a serious risk that [it] would
 21 compromise a specific trial right of one of the defendants, or prevent the
 22 jury from making a reliable judgment about guilt or innocence." *Marshall v.*
State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) (quoting *Zafiro*, 506 U.S.
 23 at 539). Here, Rimer informed the district court that there were no *Bruton*-
 24 type problems, see *Bruton v. United States*, 391 U.S. 123, 126 (1968)
 25 (holding that a defendant's constitutional right to confront his accusers is
 violated when a nontestifying codefendant's statement incriminates him and
 is used at their joint trial), and the district court determined that Rimer's
 defense—that he was sick in bed and relinquished all parenting
 responsibilities to Colleen—and Colleen's defense—that she had myotonic
 dystrophy and relied on others in the household to care for [J.R.]—were not
 so inconsistent or inherently prejudicial that they require severance, see
 generally *Marshall*, 118 Nev. 644-48, 56 P.3d 377-80 (discussing
 inconsistent defenses). We conclude that the district court did not abuse its
 discretion in this regard.

26 (ECF No. 18-7 at 22-23.)

27 ///

28 ///

1 **2. Analysis**

2 Rimer must “demonstrate that the state court’s denial of his severance motion
 3 rendered his trial ‘fundamentally unfair’” in violation of due process. *Grigsby v. Blodgett*,
 4 130 F.3d 365, 370 (9th Cir. 1997). Because denying the motion to sever likely did
 5 prejudice Rimer in such a way that the jury was prevented “from making a reliable
 6 judgment about [Rimer’s] guilt or innocence,” see *Zafiro*, 506 U.S. at 539, the Court finds
 7 that he was deprived of his right to due process.

8 Rimer’s defense was that he was sick in bed and relinquished parenting
 9 responsibilities to Colleen, while Colleen’s defense was that she relied on others in the
 10 household to care for J.R. (ECF No. 30-35 at 57-58, 70, 78.) Rimer was the only other
 11 adult and legal guardian of the Rimer children, including J.R. As such, Rimer directly
 12 blamed Colleen for J.R.’s death, and Colleen indirectly blamed Rimer for J.R.’s death.
 13 Moreover, no other person was legally responsible for the care of J.R. Not only were their
 14 defenses mutually antagonistic, but they were also mutually exclusive: one of the two was
 15 responsible for caring for J.R. when he died. If jurors believed Colleen’s testimony that
 16 she was unable to care for J.R. due to her disability, the necessary inference is that Rimer
 17 failed to assume the responsibility to care for J.R. in Colleen’s absence.

18 Even if the initial joinder was proper under Nevada law, which this Court does not
 19 review, the failure to sever Rimer and Colleen’s trials required that the jury hear both
 20 Rimer and Colleen reject responsibility for J.R.’s death. Mutually antagonistic defenses
 21 are not per se prejudicial, see *Zafiro*, 506 U.S. at 538, and even a prejudicial joinder does
 22 not necessarily require severance, see *id.* at 539. However, the U.S. Supreme Court has
 23 recognized that joint trials may be fundamentally unfair such that the defendant is denied
 24 his due process right to a fair trial. See *id.* at 538-39. The specific circumstances of their
 25 defenses and the inflammatory facts of this case indicate Rimer was prejudiced by the
 26 failure to sever his trial from Colleen’s, and the prejudice was likely compounded by
 27 the joinder of abuse charges with the death charges (as discussed in ground 4). For the
 28 death charges specifically, each defendant relied upon the other’s responsibility to

1 exonerate themselves—someone was legally responsible for J.R.’s care when he died,
2 and if it was not Colleen, then it necessarily was Rimer. Moreover, the jury heard both
3 parents reject responsibility for J.R.’s death, increasing the likelihood that the jury would
4 conclude both parents were culpable, or were otherwise criminally negligent.
5 Additionally, the Court agrees with Rimer that the general jury instructions given likely
6 were insufficient to cure the prejudice inherent in the joined trial. Jury Instruction No. 3
7 told the jury it was their “duty to give separate, personal consideration to the case of each
8 individual defendant” by “analyz[ing] what the evidence shows with respect to that
9 individual, leaving out of consideration entirely any evidence admitted solely against some
10 other defendant.” (ECF No. 31-9 at 8.) While “[a] habeas court must presume that jurors
11 follow the jury instructions,” *Busby*, 661 F.3d at 1017, the Ninth Circuit has expressed
12 doubt that general instructions are sufficient to cure prejudice in joined trials where the
13 joinder creates prejudice. See, e.g., *Bean*, 163 F.3d at 1084 (explaining that general
14 instructions to compartmentalize evidence may be unrealistic depending on the facts of
15 the allegedly prejudicial joinder). It is therefore possible that the jury instructions did not—
16 even could not—cure the prejudice of the mutually antagonistic defenses.

17 The Nevada Supreme Court’s determination that the trial court did not abuse its
18 discretion therefore resulted in an unreasonable application of federal law. The Nevada
19 Supreme Court correctly determined that there were no *Bruton*-type problems, but failed
20 to consider that the defenses were more than mutually antagonistic—they were mutually
21 exclusive. Colleen’s statement that she relied on others in the home to care for J.R.
22 necessarily implicated Rimer because he was the only other adult in the home and J.R.’s
23 other parent. Accordingly, one of the two would be legally responsible for his care.
24 Moreover, the Nevada Supreme Court did not appear to address the compounded
25 prejudice of the jury hearing both parents reject responsibility for J.R.’s death. Because
26 the jury could not accept both Rimer and Colleen’s defenses, and that by hearing both
27 defenses there was a strong risk the jury would find both parents criminally negligent, the
28 Nevada Supreme Court’s review did not reasonably consider the mandate from *Zafiro*

1 that the jury must be protected from hearing mutually antagonistic defenses that would
 2 prevent them from reliably ascertaining Rimer's guilt or innocence.

3 For these reasons, the Court finds that under the circumstances of this case and
 4 the nature of the two defenses, Rimer and Colleen's trials could not proceed jointly
 5 without depriving Rimer of his right to due process. Accordingly, the Nevada Supreme
 6 Court's denial of relief resulted in an unreasonable application of federal law. However,
 7 for the same reasons as explained in ground 4, the Ninth Circuit has indicated that the
 8 law surrounding severance of defendants may not be clearly established. The Court
 9 therefore concludes that Rimer is not entitled to federal habeas relief for ground 5.
 10 Because the Court finds that the defenses were mutually antagonistic and did prejudice
 11 Rimer, and that general jury instructions given likely did not cure that prejudice, the Court
 12 will issue a certificate of appealability for ground 5. Rimer may seek review from the
 13 Ninth Circuit on whether the Nevada Supreme Court unreasonably applied "clearly
 14 established" federal law in this circumstance.

15 **F. Ground 6—Prosecutorial Misconduct**

16 In ground 6, Rimer alleges that his right to due process and a fair trial were
 17 violated as a result of prosecutorial misconduct. (ECF No. 17 at 41.) Rimer alleges five
 18 instances of misconduct, which this Court will address in turn: (1) repeated use of the
 19 term "beating," (2) suggesting facts not in evidence, (3) shifting the burden of proof, (4)
 20 commenting on the right to silence, and (5) exhortation of the jury. (*Id.* at 41-45.)

21 **1. Prosecutorial Misconduct Standard**

22 "[T]he touchstone of due process analysis in cases of alleged prosecutorial
 23 misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v.*
Phillips, 455 U.S. 209, 219 (1982). "The relevant question is whether the prosecutors'
 25 comments 'so infected the trial with unfairness as to make the resulting conviction a
 26 denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting
Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). In making that determination, this
 28 Court looks to various factors: "the weight of the evidence, the prominence of the

comment in the context of the entire trial, whether the prosecution misstated the evidence, whether the judge instructed the jury to disregard the comment, whether the comment was invited by defense counsel in summation and whether defense counsel had an adequate opportunity to rebut the comment.” *Floyd v. Filson*, 949 F.3d 1128, 1150 (9th Cir. 2020) (quoting *Hein v. Sullivan*, 601 F.3d 897, 914 (9th Cir. 2010)). “[P]rosecutorial misconduct[] warrant[s] relief only if [it] ‘had substantial and injurious effect or influence in determining the jury’s verdict.’” *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

2. Ground 6a—Repeated Use of “Beating”

During direct examination of Q.R., the prosecutor asked if “there had been occasions where [Rimer] used to beat” him. (ECF No. 30-38 at 36.) Q.R. responded, “[h]e gave me spankings.” (*Id.*) A little while later, the prosecutor stated, “I would like to go back to the questions about each one of the beatings with the paddle or belt.” (*Id.* at 39.) Rimer’s counsel “object[ed] to the characterization of beating.” (*Id.*) The state district court sustained the objection, explaining that Q.R.’s “term was spanking.” (*Id.*) A few questions later, the prosecutor asked Q.R. to give “an example of what . . . [he] did do that would cause [Rimer] to beat [him] with the paddle or belt.” (*Id.* at 40.) Rimer’s counsel objected, and the state district court “sustain[ed] the objection as to beating.” (*Id.*) The prosecutor apologized. (*Id.*)

Later, during cross-examination of a defense witness, the prosecutor asked, “[w]ere you aware that Mr. Rimer used oars that he used to beat his children with.” (ECF No. 30-39 at 155.) The defense witness responded, “I have been told that.” (*Id.*) A few questions later, the prosecutor asked, “[t]he fact that you heard from Mr. Rimer that he had an oar to beat his children, that didn’t cause you concern.” (*Id.* at 156.) Rimer’s counsel objected “to the term beat.” (*Id.*) The prosecutor argued that the defense witness “agreed with [him] when [he] used the term,” but the state district court sustained the objection, instructing the prosecutor to use the word “discipline.” (*Id.*) The prosecutor

1 then asked the defense witness whether he had previously used the term beat, and the
 2 defense witness indicated that he did not "like the term beat." (*Id.*)

3 During closing argument, the prosecutor made the following remarks: (1) Q.R.
 4 "had been the subject of the discipline and the beatings with a boat oar and a belt," (2)
 5 Q.R. "was beaten with a boat oar and a belt," (3) Q.R. testified "that those beatings took
 6 place at least on occasions between 10 and 15 times or 20 to 25 times," (4) "the paddles
 7 broke during actual beatings of the Rimer children," (5) Q.R.'s "beating was . . .
 8 confirmed by his brother Brandon," and (6) Rimer "was in a full on rage" during "the
 9 beatings." (ECF No. 31-4 at 96, 104-05.)

10 In affirming Rimer's judgment of conviction, the Nevada Supreme Court held:

11 First, Rimer claims that the prosecutor committed misconduct by
 12 characterizing spankings as beatings. However, any harm arising from the
 13 prosecutor's use of the term "beatings" during his examination of the
 14 witnesses was cured when the district court sustained Rimer's objections,
 15 and the prosecutor did not commit misconduct by using the term during
 closing argument because he was free to argue facts or inferences
 supported by the evidence and to offer conclusions on disputed issues
 during closing argument. See *Miller v. State*, 121 Nev. 92, 100, 110 P.3d
 53, 59 (2005).

16 (ECF No. 18-7 at 29.)

17 Even if the prosecutor committed misconduct by using the term "beating" on one
 18 or two occasions during a two-week trial after an objection regarding the use of that word
 19 had been sustained, the Nevada Supreme Court reasonably determined that Rimer fails
 20 to demonstrate that this alleged misconduct "so infected [his] trial with unfairness as to
 21 make [his] resulting conviction a denial of due process." *Darden*, 477 U.S. at 181; see
 22 also *Sassounian v. Roe*, 230 F.3d 1097, 1107 (9th Cir. 2000) (determining, in part, that
 23 the petitioner was not denied a fair trial due to prosecutorial misconduct because "the
 24 misconduct was isolated"). Indeed, as the Nevada Supreme Court reasonably noted,
 25 the state district court sustained Rimer's objections to the use of the word and instructed
 26 the prosecutor to use the word "discipline" instead. And regarding the prosecutor's
 27 closing argument, the comments were well within the bounds of professional conduct,
 28 as the prosecutor merely presented his view of the evidence: the use of a boat oar to

1 discipline his children amounting to beatings. See *Drayden v. White*, 232 F.3d 704, 713
 2 (9th Cir. 2000) (concluding that “the prosecutor’s statements were supported by the
 3 evidence and reasonable inferences that could be drawn from the evidence”). Thus, the
 4 Nevada Supreme Court’s denial of relief on Rimer’s prosecutorial misconduct claim
 5 regarding the use of the term “beating” was neither contrary to, nor an unreasonable
 6 application of, clearly established federal law and was not based on an unreasonable
 7 determination of the facts. Rimer is not entitled to federal habeas relief for ground 6a.

8 **3. Ground 6b—Suggestion of Facts Not in Evidence**

9 During cross-examination of Dr. Carl Dezenberg, J.R.’s pediatric
 10 gastroenterologist, the prosecutor asked if it would cause him “concern if [he] learned
 11 that the week prior to the removal of [J.R.’s] G-tube by Dr. Reyna, Colleen Rimer hadn’t
 12 cleaned the site.” (ECF No. 31-1 at 166.) Dr. Dezenberg responded that he had not
 13 “hear[d] anything to that affect.” (*Id.*) A few questions later the prosecutor asked, “[w]ould
 14 it have caused you concern if you had learned that on the day that [J.R.] was presented
 15 to have his G-tube removed by Dr. Reyna that Dr. Reyna refused to do surgery because
 16 [J.R.] was so dirty.” (*Id.* at 167.) Rimer’s counsel objected, explaining that those were
 17 “[f]acts not in evidence.” (*Id.*) The state district court inquired whether the prosecutor
 18 was asking hypothetically, and the prosecutor answered in the affirmative. (*Id.*) Dr.
 19 Dezenberg responded that those facts would cause him concern. (*Id.* at 168.)

20 In affirming Rimer’s judgment of conviction, the Nevada Supreme Court held:

21 Third, Rimer claims that the prosecutor committed misconduct by conveying
 22 facts not in evidence through a hypothetical question posed to a defense
 23 expert. Dr. Carl Dezenberg testified that he did not have any concerns about
 24 the care that [J.R.] was receiving from his family. In an attempt to undermine
 25 Dr. Dezenberg’s testimony, the prosecutor asked,

26 Would it have caused you concern if you had learned that on
 27 the day that [J.R.] was presented to have his G-tube removed
 28 by Dr. Reyna that Dr. Reyna refused to do surgery because
 [J.R.] was so dirty he needed to have him bathed before [he]
 was willing to perform the surgery?

The district court allowed the question after determining that it was being posed as a hypothetical question. The prosecutor’s question did not constitute misconduct because opposing parties are allowed to explore and challenge the basis of an expert witness’s opinion. See NRS 50.285(2) (an expert may base his opinion on facts and data that are not admissible in evidence); *Blake v. State*, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005) (“It

is a fundamental principle in our jurisprudence to allow an opposing party to explore and challenge through cross-examination the basis of an expert witness's opinion."); *Anderson v. Berrum*, 36 Nev. 463, 469, 136 P. 973, 976 (1913) ("On cross-examination it is competent to call out anything to modify or rebut the conclusion or inference resulting from the facts stated by the witness on his direct examination.").

(ECF No. 18-7 at 29-30.)

As the Nevada Supreme Court—the final arbiter of Nevada law—reasonably determined, it was not improper for the prosecutor to ask Dr. Dezenberg a hypothetical question based on facts not in evidence, as such a question is allowed by Nevada law. See NRS § 50.285(2) (“If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”). Further, it is unlikely that the prosecutor’s statements in this regard had any real effect on the jury’s verdict, as there was various testimony that J.R.’s G-tube site was dirty, including testimony by a Nevada Early Intervention Services employee that J.R.’s G-tube site was leaking, red, not being cleaned properly, and necrotic. (ECF No. 31-1 at 49, 50, 65, 66.) Consequently, the Nevada Supreme Court’s denial of relief on Rimer’s prosecutorial misconduct claim regarding the hypothetical question posed to Dr. Dezenberg was neither contrary to, nor an unreasonable application of, clearly established federal law and was not based on an unreasonable determination of the facts. Rimer is not entitled to federal habeas relief for ground 6b.

4. Ground 6c—Shifting the Burden of Proof

During closing argument, the prosecutor commented, “what evidence is there to suggest that [Rimer and Colleen] were sick. How about a witness.” (ECF No. 31-4 at 88.) Rimer’s counsel objected, arguing that such a comment amounted to burden shifting. (*Id.*) The state district court overruled the objection. (*Id.* at 89.)

In affirming Rimer's judgment of conviction, the Nevada Supreme Court held:

Fourth, Rimer claims that the prosecutor committed misconduct by arguing that the defense failed to prove that the Rimers were sick on the day of [J.R.]'s death. During the opening statements, both Rimer and Colleen claimed that the evidence would show that they were sick and spent most of the day in bed. The prosecutor acknowledged these statements during closing argument and asked, "what evidence is there to suggest that they

were sick. How about a witness." This argument was not misconduct because the prosecutor was merely pointing out "that the defense failed to substantiate its theory with supporting evidence." *Evans v. State*, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001); see *Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

(ECF No. 18-7 at 30.)

As the Nevada Supreme Court reasonably determined, this comment was not misconduct. "A prosecutor may, consistent with due process, ask a jury to convict based on the defendant's failure to present evidence supporting the defense theory." *Menendez v. Terhune*, 422 F.3d 1012, 1034 (9th Cir. 2005). Here, Rimer's defense, at least in part, was that he was sick on June 8, 2008, and as such, "[h]e was never informed that [J.R.] was missing" or that "there was a problem." (See ECF No. 30-35 at 57–58 (opening statement by Rimer's counsel that "Stan Rimer woke up feeling ill" on the morning of June 8, 2008, and went to bed after church because "[h]e was feeling puny, bad").) Therefore, the Nevada Supreme Court's denial of relief on Rimer's prosecutorial misconduct claim regarding the prosecutor's comment about the lack of evidence to support the defense's theory was neither contrary to, nor an unreasonable application of, clearly established federal law and was not based on an unreasonable determination of the facts. Rimer is not entitled to federal habeas relief for ground 6c.

5. Ground 6d—Commenting on the Pre-Arrest Right to Silence

During closing argument, the prosecutor commented,

[Rimer's counsel] stood up there and said it's overcharging because CPS could have done this for years. Why wasn't it done before by CPS. The answer is simple. When you kill your kid, you don't have the right to stop the homicide cops from interviewing you. You don't have the right to ask [Q.R.] and [E.R.] and [S.R.] and Brandon what is going on in that house. At that point, their brother is dead, they don't have the pressure of not saying things to their teachers, to CPS, to other church members. At that point, they tell the whole horrifying story. And it's corroborated by every witness, every note, every piece of evidence that's been admitted in this case. Stanley Rimer for years precluded the system from helping these kids.

(ECF No. 31-4 at 185-86.)

In affirming Rimer's judgment of conviction, the Nevada Supreme Court held:

1 Rimer further claims that the prosecutor committed misconduct
 2 by . . . arguing that Rimer had no choice but to speak to authorities after
 [J.R.'s] death

3 We have carefully reviewed [this claim] and, to the limited extent that
 4 there was error, we conclude that the error did not affect Rimer's substantial
 5 rights and therefore he has not demonstrated plain error. See *United States*
v. Olano, 507 U.S. 725, 734 (1993) (An error that affects the substantial
 rights of a defendant is one that "affected the outcome of the district court
 proceedings.").

6 (ECF No. 18-17 at 33.)

7 The State's comments on a defendant's silence violate the self-incrimination
 8 clause of the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 614 (1965). While the
 9 State violates *Griffin* when it "direct[ly] comment[s] about the defendant's" silence, the
 10 State only violates *Griffin* when it "indirect[ly] comment[s] about the defendant's
 11 silence] . . . 'if it is manifestly intended to call attention to the defendant's [silence] or is
 12 of such a character that the jury would naturally and necessarily take it to be a comment
 13 on the [defendant's silence].'" *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006) (quoting
 14 *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987)).

15 Read objectively, the prosecutor's comment was not manifestly intended to call
 16 attention to Rimer's pre-arrest silence, or lack thereof, or was of such a character that the
 17 jury would naturally and necessarily take it to be a comment on Rimer's pre-arrest silence,
 18 or lack thereof. See *Hovey*, 458 F.3d at 912. Rather, the prosecutor's comment was
 19 merely highlighting, in response to Rimer's counsel's argument, that criminal charges
 20 were not previously brought by CPS because Rimer had previously prohibited his children
 21 from speaking with CPS employees, a prohibition he was not able to enforce when
 22 homicide detectives were investigating J.R.'s death. Accordingly, the Nevada Supreme
 23 Court's denial of relief on Rimer's prosecutorial misconduct claim regarding the
 24 prosecutor's alleged comment on Rimer's pre-arrest silence, or lack thereof, was neither
 25 contrary to, nor an unreasonable application of, clearly established federal law and was
 26 not based on an unreasonable determination of the facts. Rimer is not entitled to federal
 27 habeas relief for ground 6d.

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1 **6. Ground 6e—Exhortation of the Jury**

2 During closing argument, the prosecutor commented, “Stanley Rimer for years
 3 precluded the system from helping these kids. Yes, as part of that system, not part of
 4 the CPS system, I feel horrible that the system failed [J.R.]. But don’t let it fail him again.”
 5 (ECF No. 31-4 at 186.)

6 In affirming Rimer’s judgment of conviction, the Nevada Supreme Court held:

7 Rimer further claims that the prosecutor committed misconduct
 8 by . . . exhorting the jurors not to let the system fail [J.R.] again.

9 We have carefully reviewed [this claim] and, to the limited extent that
 10 there was error, we conclude that the error did not affect Rimer’s substantial
 11 rights and therefore he has not demonstrated plain error. See *United States v. Olano*, 507 U.S. 725, 734 (1993) (An error that affects the substantial
 12 rights of a defendant is one that “affected the outcome of the district court
 13 proceedings.”).

14 (ECF No. 18-17 at 33.)

15 A prosecutor shall not “try to exhort the jury to ‘do its job’ [because] that kind of
 16 pressure . . . has no place in the administration of criminal justice.” *United States v. Young*, 470 U.S. 1, 18 (1985) (ultimately concluding that, “reviewed in context,” the
 17 statements did not undermine fundamental fairness and “contribute to a miscarriage of
 18 justice”). Even if the prosecutor’s statement that the jury should not let the system fail
 19 J.R. amounted to misconduct, the Nevada Supreme Court reasonably concluded that
 20 Rimer was not entitled to relief. Indeed, Rimer fails to demonstrate that this single
 21 comment at the end of a lengthy closing argument that was brought about in response
 22 to Rimer’s counsel’s argument¹¹ “had substantial and injurious effect or influence in
 23 determining the jury’s verdict.” *Brecht*, 507 U.S. at 637-38. Thus, the Nevada Supreme
 24 Court’s denial of relief on Rimer’s prosecutorial misconduct claim regarding the
 25 prosecutor’s exhortation comment was neither contrary to, nor an unreasonable
 26 application of, clearly established federal law and was not based on an unreasonable
 27 determination of the facts. Rimer is not entitled to federal habeas relief for ground 6e.

28 ¹¹Rimer’s counsel argued that “[t]he best evidence that there was no criminal
 abuse or neglect between 2004 and 2008 is the fact that CPS never filed a case . . . in
 family court.” (ECF No. 31-4 at 124.)

1 **G. Ground 7—Cumulative Error**

2 In ground 7, Rimer alleges that cumulative errors throughout the trial served to
 3 violate his right to due process. (ECF No. 17 at 46.) In affirming Rimer's judgment of
 4 conviction, the Nevada Supreme Court held: "Rimer claims that cumulative error
 5 requires reversal of his convictions. However, because Rimer has failed to demonstrate
 6 any trial error, we conclude that he was not deprived of a fair trial due to cumulative
 7 error." (ECF No. 18-7 at 33-34.)

8 Cumulative error applies where, "although no single trial error examined in
 9 isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple
 10 errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381
 11 (9th Cir. 1996); see also *Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004)
 12 (explaining that the court must assess whether the aggregated errors "so infected the
 13 trial with unfairness as to make the resulting conviction a denial of due process" (citing
 14 *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The Court has not identified any
 15 definite errors, so there is no cumulative error. Rimer is denied federal habeas relief for
 16 ground 7.

17 **V. MOTION FOR HEARING**

18 Rimer moves for an evidentiary hearing to present additional evidence on
 19 whether he can overcome the default via *Martinez* on ground 1. (ECF No. 74.) The
 20 Supreme Court has recently held that "a federal habeas court may not conduct an
 21 evidentiary hearing or otherwise consider evidence beyond the state-court record
 22 based on ineffective assistance of state postconviction counsel" unless the prisoner
 23 can satisfy 28 U.S.C. § 2254(e)(2)'s stringent requirements under AEDPA. *Shinn v.*
Ramirez, 142 S.Ct. 1718, 1734 (2022). Rimer fails to demonstrate that those stringent
 25 requirements are met here. Further, neither further factual development nor any
 26 evidence that may be proffered at an evidentiary hearing would entitle Rimer to relief
 27 on ground 1 because he fails to demonstrate prejudice. See *Schriro v. Landigan*, 550
 28 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or

1 otherwise precludes habeas relief, a district court is not required to hold an evidentiary
2 hearing.”). As such, Rimer’s motion is denied.

3 **VI. CERTIFICATE OF APPEALABILITY**

4 This is a final order adverse to Rimer. Rule 11 of the Rules Governing Section
5 2254 Cases requires this Court to issue or deny a certificate of appealability (COA). This
6 Court has *sua sponte* evaluated the claims within the petition for suitability for the
7 issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65
8 (9th Cir. 2002). Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the
9 petitioner “has made a substantial showing of the denial of a constitutional right.” With
10 respect to claims rejected on the merits, a petitioner “must demonstrate that reasonable
11 jurists would find the district court’s assessment of the constitutional claims debatable or
12 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S.
13 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists
14 could debate (1) whether the petition states a valid claim of the denial of a constitutional
15 right and (2) whether this Court’s procedural ruling was correct. *Id.*

16 As explained above, this Court finds that a certificate of appealability is warranted
17 for grounds 4 and 5. It is unclear from the current state of Ninth Circuit law whether
18 failure to sever counts is reviewable in a collateral habeas case. If it is, then relief should
19 be granted for grounds for and 5. This Court declines to issue a certificate of
20 appealability for its resolution of any procedural issues or any of Rimer’s remaining
21 grounds.

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1 **VII. CONCLUSION**

2 It is therefore ordered that Rimer's first amended petition for a writ of habeas
3 corpus pursuant to 28 U.S.C. § 2254 (ECF No. 17) is denied.

4 It is further ordered that the motion for an evidentiary hearing (ECF No. 74) is
5 denied.

6 It is further ordered that a certificate of appealability is granted for grounds 4 and
7 5 only, and is denied for Rimer's remaining grounds.

8 The Clerk of Court is directed to enter judgment accordingly and close this case.

9 DATED THIS 20th Day of July 2022.

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11 MIRANDA M. DU
12 CHIEF UNITED STATES DISTRICT JUDGE

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